Supreme Court, U.S.
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IN THE

Supreme Court of the United States

COAST AUTOMOTIVE GROUP, LTD., *et al.*,

Petitioners,

v.

MERCEDES BENZ, U.S.A., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In its September 29, 2006 decision, the district court found:

> Here, a genuine issue of material fact exists regarding whether [Mercedes Benz, U.S.A. ("MBUSA")] retained an ulterior motive for terminating Coast's franchise agreement, namely that [MBUSA] sought to punish Coast defendants for refusing to participate in an alleged price fixing conspiracy.
>
> . . . Here, there remains a genuine issue regarding whether Coast defendant's alleged resistance to such an alleged conspiracy formed the basis for retaliatory conduct on the part of [MBUSA] by terminating the franchise agreement. Regardless of whether an independent, objective basis exists for such a termination, what remains at issue is the subjective motivations of [MBUSA]. For these reasons, plaintiffs' motion for summary judgment on Counts Three and Four of Coast defendants' counterclaims is denied.

Earlier, the district court had also found there was "evidence that [MBUSA] agreed with its dealers to set prices as close to MSRP [*i.e.* manufacturer's suggested retail price] as possible and that aggressive discounting from MSRP, or 'cheating,' *would result in punishment by MBUSA*." The district court also cited that prior to the termination of Coast's franchise by MBUSA, that there was evidence that Coast had received direct threats from

MBUSA that if Coast did not join the Mercedes Benz price-fixing conspiracy that its allocation of inventory from MBUSA would be reduced. Coast resisted the price-fixing conspiracy and the summary judgment record reflects that its annual allocation of vehicles was subsequently reduced by MBUSA in the time leading up to Coast's termination, initially by 25%. By contrast, sales of Mercedes Benz vehicles were on their way to more than doubling in Coast's region in the years leading up to Coast's termination. The district court, however, dismissed Coast's claims on summary judgment finding that its damages calculation experts did not independently verify the antitrust liability set forth by the above facts, which liability the district court had already found turned largely on the question of MBUSA's motives. The Third Circuit subsequently affirmed ascribing to Coast's damages calculation experts a "failure to [1] independently verify [Coast's] claims of unfair allocation or [2] analyze Mercedes' allocation procedures . . ." and that Coast's position that it had been retaliated against was, in the Third Circuit's words, a "naked contention." As such:

1. Are the district court's and circuit court's decisions granting/upholding summary judgment dismissing Coast's claims contrary to this Court's antitrust summary judgment precedent?

2. Is the new rule manufactured by the district court and the circuit court, requiring an expert whose sole purpose is damages calculation (i.e. lost profits and franchise valuation) to independently verify antitrust liability, contrary to this Court's precedent and existing antitrust law and rules regarding the admissibility of expert testimony?

3. Is the new rule manufactured by the district court and the circuit court, requiring an expert whose sole purpose is damages calculation (i.e. lost profits and franchise valuation) to independently verify antitrust liability in order to have an admissible opinion on the separate issue of damages calculation, contrary to this Court's summary judgment standard, this Court's standard for measurement of damages in an antitrust matter and this Court's rules regarding the admissibility of expert damages testimony where: (1) as part of the antirust wrongdoing itself, MBUSA failed to substantiate an objective "allocation procedure," in the record (2) MBUSA failed to confirm that any particular "allocation procedure" was even applied to the allocation of Coast's inventory and (3) despite faulting Coast's damages experts, the district court and Third Circuit failed to find that damages calculation experts actually do rely upon or "analyze" any such theoretical "procedures" in any fashion in order to calculate lost profits as opposed to drawing their conclusions from actual historic sales data, as illustrated in the caselaw, and as Coasts damages experts in fact did in this matter?

LIST OF PARTIES

The Petitioners Coast Automotive Group, Ltd. and Tamim Shansab are the Defendants/ Counterclaimants/ Third Party Plaintiffs. The Respondents are Plaintiff/ Counterclaim Defendant Mercedes Benz, U.S.A., and Third Party Defendants David Michael Motor Car Corp.; Ray Catena Motor Cars Corp.; and Contemporary Motor Cars, Corp.

CORPORATE DISCLOSURE STATEMENT

Petitioner Coast Automotive Group, Ltd. d/b/a TSE Motor Cars is owned 100% by Tamim Shansab.

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OPINIONS BELOW

The Third Circuit's January 25, 2010 unreported panel opinion denying the appeal of Coast Automotive Group, Ltd. ("Coast") is at Petition Appendix A 1a (hereinafter "_a"). The Third Circuit denied Coast's petition for panel and *en banc* rehearing on March 10, 2010. 62a. The district court's September 29, 2006 unreported opinion granting summary judgment against Coast is at 20a. The district court's unreported opinion denying reconsideration of its grant of summary judgment is at 7a.

JURISDICTION

On March 10, 2010, the Third Circuit denied rehearing of the Third Circuit's panel opinion and judgment which was entered on January 25, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES

15 U.S.C. § 1 *et. seq.* ("Sherman Antitrust Act") ("Every . . . conspiracy, in restraint of trade or commerce . . . is declared to be illegal.")

15 U.S.C. §§15 ("Clayton Antitrust Act")(". . . any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained . . .")

STATEMENT OF THE CASE

This case arises from an automobile manufacturer's systematic destruction of the counterclaim plaintiff's auto dealership business because of the dealer's refusal to acquiesce to its illegal price-fixing conspiracy. Both the district court and the circuit court, rather than giving the dealer its day in court, sanctioned this "legalized robbery" by creating a new standard for summary judgment in antitrust cases that contradicts this Court's prior precedents and violates the strong public policy behind those precedents. As a result, the manufacturer has been rewarded for its illegal conduct and the dealer has been punished for coming forward and trying to put a stop to that misconduct.

The New York Times on August 29, 1999 published a report headlined "At Car Dealers, a No Haggle Policy Sets off a Battle--a Mercedes Strategy Draws a Challenge." This four-column article (which, despite all attempts, could no longer be located on the paper's Internet archive or LEXISNEXIS) in the Sunday *Times* business section exposed years of an alleged Mercedes Benz, U.S.A. (hereinafter "MBUSA") corporate price-fixing conspiracy with its New York Region Mercedes Benz dealers. The article reported the accounts of a Mercedes Benz dealer, whistleblower Tamim Shansab ("Shansab"), owner of Petitioner Coast Automotive Group, Ltd. d/b/a TSE Motor Cars (hereinafter "Coast") in Toms River, New Jersey, and others. Significantly, the article reported that through the 1990's the New York Region Mercedes Benz dealers had met regularly and had covertly exchanged confidential information related to the pricing of vehicles. The report

furthermore revealed MBUSA's then-imminent plan to roll out a formal nationwide price-fixing scheme labeled the "NFP" or "Negotiation-Free Process."

The reported existence of this alleged national price-fixing scheme subsequently was confirmed in federal court testimony by a former MBUSA employee:

> Walter Simmons, a service operations manager for MB USA from 1995 to 1999, testified that MB USA Chief Executive Officer Michael Jackson told the dealers at a national meeting [in Dallas, Texas] that they were required to "sell the car for what the advertised price is" and "hold the line" on [Manufacturer's Suggested Retail Price i.e. "MSRP"] or face being "put out of business." (Corrigan Cert. Ex. 36 at 60, 75).

In Re. Mercedes Benz Antitrust Litig., 2006 U.S. Dist. LEXIS 51202 *50.

MBUSA's threat to put dealers out of business if they did not follow the price-fixing scheme was not an empty threat. For years, Shansab had refused to join in any price-fixing conspiracy. In 1998, he filed an antitrust lawsuit[1] against MBUSA and several regional competitors. This whistleblower action and Shansab's

1. Coast filed a state law antitrust lawsuit against MBUSA in 1998. Immediately after MBUSA terminated Coast's franchise in retaliation in 1999 and filed in federal district court under the Lanham Act, the district court took jurisdiction over all aspects of the litigation.

refusal to join MBUSA's price-fixing conspiracy caused MBUSA to terminate Shansab's $12.1 million Mercedes Benz franchise in 1999 without any compensation.

Coast respectfully submits that this Court's words from 1931 in *Story Parchment* must ring loud and clear once again in consideration of this Petition. In *Story Parchment* this Court warned that "the adoption of any arbitrary rule . . . which will relieve the wrongdoer from any part of the damages, and throw the loss upon the injured party would be little less than legalized robbery." *Story Parchment v. Paterson Parchment Paper Co.*, 282 U.S. 555, 565, 51 S. Ct. 248, 251, 75 L. Ed. 544, 549 (1931).

Indeed, in the words of this Court, "legalized robbery" of a $12.1 million franchise is what has occurred in this matter. After having its $12.1 million franchise stripped by these co-conspirators, the district court dismissed Coast's antitrust damages claims on summary judgment.

The district court's underlying findings, however, were irreconcilable with its ultimate decision to dismiss Coast's case. This district court had in fact earlier found that Coast's allegations that MBUSA had retaliated against it for refusing to agree to fix prices had already met the summary judgment standard:

> Here, there remains a genuine issue regarding whether *Coast defendant's alleged resistance* to such an alleged conspiracy formed the basis for *retaliatory conduct* on the part of plaintiff by terminating the franchise agreement. Regardless of whether

> an independent, objective basis exists for such a termination, what remains at issue is the subjective motivations of [MBUSA].

(emphasis supplied) 40a.

From this record, it was clear that Coast had satisfied this Court's standard for antitrust "fact of injury," "fact of damage" or "causation." Despite this finding by the district court, Coast was in fact *denied* its day in court by summary judgment entered in direct contravention to this Court's long-standing antitrust and summary judgment precedents.

In doing so, the district court did not follow or even acknowledge its own findings in favor of Coast or this Court's precedent on antitrust "fact of injury," "fact of damage" or "causation."

Confusing *liability* and *measurement of damages*, the district court declared that the testimony of Coast's two proposed *damages* experts rendering otherwise routine damages calculations was inadmissible for reasons pertaining to *liability*. Their credentials to render their damages calculations—one an accountant and the other an economist—were never questioned by the district court.[2]

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2. Coast's two damages experts were Howard Markovitz, C.P.A. who calculated damages of $6.38 million during the period of 1995 through Coast's termination in 1999 and economist Dr. John Del Roccili who calculated the value of Coast's franchise at $12.1 at the time of Coast's termination.

Rather, in an unprecedented turn, the district court faulted Coast's *damages* calculation experts because they, themselves, had not set out to independently prove antitrust "fact of injury," "fact of damage" or "causation"—something they were not proffered for in the first place because their focus was *damages calculation only*.

The evidence in the summary judgment record was that in the years prior to Coast's wrongful termination, MBUSA had specifically threatened, or to use its words, "promised," that it would reduce Coast's allocation of vehicles if Coast did not agree to participate in its illegal price-fixing conspiracy. Indeed, MBUSA acted on its threats. MBUSA's own records in evidence confirmed that MBUSA subsequently did in fact reduce Coast's annual allocation of vehicles, as "promised," from 247 vehicles in 1994 to 187 vehicles in 1995, with more reductions thereafter. By contrast, while allocations to Coast were being slashed, sales in Coast's region doubled from approximately 12,000 vehicles per year in 1995 to over 26,000 in 1998, with Coast being excluded from this explosion in sales because it had refused to agree to fix prices. At the summary judgment stage, the district court was required to grant Coast the benefit of all inferences.

Despite the record of explicit threats of punishment against Coast for refusing to agree to fix prices, despite the uncontroverted fact that MBUSA had slashed Coast's allocation of new vehicles in a growing market and later terminated its franchise, and despite the fact that the district court acknowledged that MBUSA's anticompetitive motives against Coast could not be

decided on summary judgment, the district court mischaracterized Coast's position on liability—necessarily relied upon by its damages calculation experts—as a nothing more than a "naked contention." 6a. That characterization was utterly contrary to the district court's own findings in which it clearly ruled that on summary judgment it could not make *any* determination or ruling whatsoever as to the "motives" of MBUSA. The district court had already determined that the truth of MBUSA's "motives" could only be decided by a jury.

The district court and the Third Circuit, however, incorrectly turned the question of MBUSA's motivation into a Rule 702/*Daubert*[3] inquiry of Coast's damages calculation experts (as opposed to an issue of antitrust liability and "causation"), and ruled that the opinions of Coast's damages calculation experts were inadmissible. The lower courts claimed this was so because these damages calculation opinions presupposed MBUSA's anticompetitive "intent" and "actions" and did not seek to independently prove antirust liability (i.e. "causation") themselves. The lower court's new requirement that Coast's damages experts prove the "antitrust liability" element of "causation" – or be barred from giving damages testimony – does not have root in any precedent of this Court.

At bottom, the lower court's decisions in this matter are directly contrary to many of this Court's decisions which are cited in this Petition, including the "traditional

3. *Daubert v. Merrill Dow Pharmaceutical*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury . . ." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565, 101 S. Ct. 1923, 1929, 68 L. Ed. 2d 442, 450 (1991).

This Petition will determine whether the whistleblower who resisted and exposed what was destined to become a nationwide price-fixing conspiracy—and lost his franchise for it—gets his day in court. As it now stands, contrary to this Court's precedent, the antitrust co-conspirators have profited from their wrongdoing, "legally robb[ing]" a $12.1 million franchise from Coast on a "trial by affidavit," held without the benefit of any hearings or oral argument on any of the subject motions or appeal, despite the millions of dollars in damages involved and the complex nature of the case. *See Story Parchment, supra; Poller v. Columbia Broadcasting Sys., Inc.* 368 U.S. 464, 472-473, 82 S. Ct. 486, 491, 7 L. Ed. 2d 458, 464 (1962). It is submitted that this Court should accept this Petition and determine that the whistleblower – who sacrificed his business and put his future at risk to protect the public from MBUSA's illegal price-fixing scheme – gets his day in court.

REASONS FOR GRANTING THE PETITION

POINT I

The district court's and circuit court's decisions conflict with this Court's prior precedents under which Coast had fully demonstrated antitrust "fact of injury," "fact of damage" or "causation."

The district court's September 29, 2006 summary judgment dismissing Coast's case was a paradox. 40a-54a. On the one hand, the district court's decision fully acknowledged that Coast had met all of the elements necessary for its antitrust claims to *survive* summary judgment:

> Here, a genuine issue of material fact exists regarding whether [the plaintiff, MBUSA,] retained an ulterior motive for terminating Coast's franchise agreement, namely that *plaintiff sought to punish Coast* defendants for refusing to participate in an alleged price fixing conspiracy.
>
> . . . But, this Court has already determined in the related class action that genuine issues remain regarding the existence of any conspiracy. Here, there remains a genuine issue regarding whether *Coast defendant's alleged resistance* to such an alleged conspiracy formed the basis for *retaliatory conduct* on the part of plaintiff by terminating the franchise agreement. Regardless of whether an independent, objective basis exists

> for such a termination, what remains at issue is the subjective motivations of the plaintiff. For these reasons, plaintiffs' motion for summary judgment on Counts Three and Four of Coast defendants' counterclaims is denied.

(emphasis supplied) 40a.

Subsequently and in stark contrast to the above, the district court dismissed *all* of Coast's Sherman/Clayton antitrust franchise termination and inventory deprivation claims, contradicting its contemporaneous findings that there were issues of fact as to MBUSA's motives. Compare 40a(discussing counts 3 and 4) to 40a-54a(discussing count 5). In doing so, the district court also failed to follow this Court's clear precedents regarding antitrust "fact of injury," "fact of damage" or "causation."

In fact, only two of Coast's damages claims even temporarily "survived" this September 29, 2006 summary judgment. 40a. These claims were Coast's Automobile Dealer Day in Court Act and Breach of Duty of Good Faith and Fair Dealing claims. 40a. The district court then followed suit and dismissed those two claims, not on their merits, but solely because the September 29, 2006 decision precluded Coast's damages calculation experts from testifying as to damages on any of Coast's claims.

After Shansab blew the whistle on MBUSA's price-fixing conspiracy, individual consumer cases were filed and then certified as a class action. Eventually, because of the common antitrust elements and common

witnesses—most notably Shansab—the consumer class action and Coast's case came under the same judge and were consolidated for discovery purposes. 24a.

Two months prior to granting summary judgment in favor of MBUSA in Coast's case, the very same judge denied summary judgment in the related consumer class action. Shansab's testimony was a critical element in the district court rejecting MBUSA's motion for summary judgment. *In Re. Mercedes Benz Antitrust Litig.*, 2006 U.S. Dist. LEXIS 51202.

In that related consumer class action, Shansab's testimony was accepted and provided direct evidence of concerted action among the Mercedes Benz dealers. By the district court's own words, its finding was one of concerted action to fix prices which included *punishing* dealers who would not themselves agree to fix prices. *In Re. Mercedes Benz Antitrust Litig.*, 2006 U.S. Dist. LEXIS 51202.

The district court also cited, accepted and relied upon the testimony of the aforementioned MBUSA employee Walter Simmons. Simmons testified that MBUSA's then Chief Executive Officer, prior to the termination of Coast's franchise, warned the national dealer body that dealers that would not go along with MBUSA's threat not to discount vehicles would unequivocally be put out of business:

> Walter Simmons, a service operations manager for MB USA from 1995 to 1999, testified that MB USA Chief Executive Officer Michael Jackson told the dealers at a

> national meeting that they were required to "sell the car for what the advertised price is" and "hold the line" on MSRP, *or face being "put out of business."* (Corrigan Cert. Ex. 36 at 60, 75).

(emphasis supplied) *In Re. Mercedes Benz Antitrust Litig.*, 2006 U.S. Dist. LEXIS 51202 *50. This, despite the fact that MBUSA claims to not set prices.

The district court confirmed the *punishment* element of the co-conspirators' conduct. The district court found:

> Here, the [class action] plaintiffs present evidence that MBUSA agreed with its dealers to set prices as close to MSRP as possible and that aggressive discounting from MSRP, or "cheating," *would result in punishment by MBUSA*. Although specific numbers were not discussed, plaintiffs clearly allege that the dealers were not free to set prices at whatever level they chose.

(emphasis supplied) *In Re. Mercedes Benz Antitrust Litig.*, 2006 U.S. Dist. LEXIS 51202 *47.

Following the district court's discussion of the testimony of the aforementioned Simmons, the district court reiterated that there was evidence in the record that MBUSA threatened to punish Coast:

> Together with Shansab's testimony and other evidence, [Walter] Simmons' testimony is

> probative of the alleged price-fixing conspiracy. Other evidence includes the testimony of George Zeigler, the sales manager at Coast Automotive Group in 1995. Ziegler said that MB USA Market Manager Joe Kurp told him that he had to sell certain vehicles "at list price and hold list price." (Corrigan Cert. 41 at 99.) Zeigler also claimed that Kurp told him that a failure to increase gross profit levels [on each vehicle *i.e.* increase prices] would result in a reduced allocation of vehicles. (Corrigan Cert. 43 at 385.)

In Re. Mercedes Benz Antitrust Litig., 2006 U.S. Dist. LEXIS 51202 *50-51.

The district court repeatedly identified the *threats of punishment* targeting Coast's allocation of vehicles:

> . . . MBUSA Market Manager Ed Chmielewski told Shansab that he was "required" to attend the Sheft Kahn [price-fixing] meetings and submit confidential dealer financial information for distribution to the other dealers. (Cooper Cert. Ex. 44 at 913.) Shansab also testified that MBUSA Market Manager Joe Kurp threatened to reduce Shansab's supply of E-Class automobiles if he priced them too aggressively because the dealers had agreed not to discount them and the dealers were upset with Shansab's earlier discounting. (Corrigan Cert. Ex. 130 at 378.).

In Re. Mercedes Benz Antitrust Litig., 2006 U.S. Dist. LEXIS 51202 *37-38, *see also, id.* at *48-49.

These findings by the district court coupled with the undisputed slashing of Coast's allocation of Mercedes Benz vehicles from 1994 to 1995 (by 25%)[4] and, again, from 1995 to 1996(by 10%), alone, however, should have been sufficient for Coast to defeat summary judgment on its antitrust claims and to satisfy the "causation" requirement under *Story Parchment*.

In fact, upon such a record, this Court's holding in *Story Parchment* compels submission of Coast's claims to a jury:

> Whether the unlawful acts of respondents or conditions apart from them constituted the proximate cause of the depreciation in value was a question, upon the evidence in this record, for the jury, "to be determined as a fact, in view of the circumstances of fact attending it." [citation omitted]

Story Parchment, 282 U.S. 566, 51 S. Ct. 252, 75 L. Ed. 550.

As this Court has stated in *Zenith Radio Corp. v. Hazeltine Research, Inc.*:

> Zenith's burden of proving the fact of damage under §4 of the Clayton Act is satisfied by *its proof of some damage flowing from the unlawful conspiracy*; inquiry beyond this minimum point goes only to the amount of and

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4. *Brief and Joint Appendix for Appellant* dated May 4, 2009 at p. 3.

> not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources in fulfilling his burden of proving a compensable injury under §4. *Continental Iron Ore v. Union Carbide & Carbon Corp.*, supra. At 702 (1962) . . .

(emphasis supplied) *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114n. 9, 89 S. Ct. 1562, 1572, 23 L. Ed. 129, 143 (1969).

Here, the district court and the circuit court failed to follow these precedents, and instead placed the unwarranted – and unsupported by any law – burden on Coast's damages experts to also demonstrate causation. Accordingly, this Court should accept this Petition to address the circuit court's failure to follow its controlling precedents.

POINT II

The district court's and circuit court's decisions to create a new rule blending antitrust "causation" and antitrust "damages calculation" conflicts with this Court's "traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury" and with this Court's precedents regarding antitrust summary judgment

Justice Blackmun, in delivering the opinion of this Court in *Eastman Kodak v. Image Technical Services* noted "[t]his is *yet another case* that concerns the standard for summary judgment in an antitrust controversy . . .", suggesting that the antitrust summary

judgment standard is both important to this Court and often misapplied or misapprehended by the lower courts. (emphasis supplied) *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 454, 112 S. Ct. 2072, 2076, 119 L. Ed. 2d 265, 276 (1992). Here, that is precisely what has occurred, as the district court and circuit court have failed to adhere to this Court's precedents and placed an excessively high burden of establishing antitrust injury on Coast.

This Court's review over the grant of summary judgment is *plenary*, as was the Third Circuit's review. 5a. The Third Circuit, however, did not fulfill its obligation to provide a plenary review and apparently misapprehended this Court's prior precedents in making its analysis. 5a-6a.

The Third Circuit did not comment on any of the summary judgment evidence in the record. 5a-6a. Likewise, it did not address or comment upon any of the arguments underlying why Coast had taken the position that it was being retaliated against—*i.e.* the record direct threats against Coast's allocation which must be accepted as true for purposes of summary judgment. 5a-6a. The Third Circuit did not acknowledge the fact that there was an un-refuted reduction of Coast's allocation by 25% in the first year of punishment alone. 5a-6a. Lastly, the Third Circuit did not acknowledge the district court's finding that questions at to MBUSA's motives had actually precluded summary judgment. 5a-6a, 40a.

This Court has expressly held that, on a motion for summary judgment in an antitrust case, the evidence of the party opposing the motion is to be believed and all justifiable inferences are to be drawn in its favor:

> Because this case comes to us on petitioner Kodak's motion for summary judgment, "[t]he evidence of [respondents] is to be believed, and all justifiable inferences are to be drawn in [their] favor." *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 255 (1986); *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 587 (1986). Mindful that respondents' version of any disputed issue of fact thus is presumed correct, we begin with the factual basis of respondents' claims. See *Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332, 339 (1982).

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. at 456, 112 S. Ct. 2076-77, 119 L. Ed. 2d at 277; *see also, Continental Ore Co. vs. Union Carbide & Carbon Corp.* 370 U.S. 690, 700-701, 82 S. Ct. 1404, 1411, 8 L. Ed. 777, 785 (1962)("it is the jury which 'weighs the contradictory evidence and inferences'").

Here, there is no record of the Third Circuit having considered Coast's evidence, no less "believing" it for the purposes of summary judgment. 5a-6a.

This Court requires that Coast be allowed to present to a jury "*all the facts and circumstances*" which have "*any tendency to show damages or their probable amount*" and that:

> [citing *Gilbert v. Kennedy*, 22 Mich. 117, 129 *et seq.*],
>
> "To deny the injured party the right to recover any actual damages in such cases, because they are of a nature which cannot be thus certainly measured, would be to enable parties to profit by, and speculate upon, their own wrongs, encourage violence, and *invite depredation*. . . ."
>
> * * *
>
> ". . . And the adoption of any arbitrary rule in such a case which will relieve the wrongdoer from any part of the damages, and throw the loss upon the injured party would be little less than *legalized robbery*."

(emphasis supplied) *Story Parchment*, 282 U.S. at 564-65, 51 S. Ct. at 251, 75 L. Ed. at 549. This Court's rule could not be clearer. A search of the lower courts' decisions does not indicate that any such standard was applied or that the considerations required by this Court took place. 5a-6a; 40a-54a.

Inasmuch as it is MBUSA that manipulated Coast's allocation of inventory and failed to produce evidence of any objective allocation procedures or to verify that any particular procedures were applied to Coast, *Story Parchment* precludes MBUSA from contending that Coast's measure of damages flowing from that manipulation was imprecise:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person . . . it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. *The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision* that would be possible if the case, which he alone is responsible for making, were otherwise. *Eastman Co. v. Southern Photo Co., 273 U. S. 359, 273 U. S. 379. Compare The Seven Brothers, 170 F.1d 6,* 128; *Pacific Whaling Co. v. Packers' Assn.*, 138 Cal. 632, 638, 72 P. 161. As the Supreme Court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer, instead of upon the injured party. *Allison v. Chandler*, 11 Mich. 542, 550-556.

(emphasis supplied) *Story Parchment*, 282 U. S. 563-564; 51 S. Ct. at 250, 75 L. Ed. at 5548; *see also, Bigelow v. RKO Radio Pictures, Inc.*, 327 U. S. 251, 66 S. Ct. 574, 90 L. Ed. 652 (1946).

The Third Circuit nevertheless incorporated by reference the district court's reasoning. The only stylistic difference is that the Third Circuit had two distinct "sections" to its decision on Coast's antitrust claims—one concerning Coast's experts and one concerning summary judgment. Both provided effectively the same reasoning.

The district court's decision disposed of Coast's experts and antitrust "causation" in the same "section" and under the same application of R. 702/*Daubert*. 41a ("Plaintiff's motion is premised *entirely* on its claim that Coast's expert testimony regarding damages is unreliable pursuant to [R]702 and Daubert . . .") (emphasis supplied) As such, none of Coast's case was judged under the summary judgment standard, the antitrust summary judgment standard or the standards for calculating antitrust damages.

Rather, the district court selectively took disputed facts which, at best, would have been fodder for cross-examination as to the "reasonable basis" of Coast's damages *calculation*. Then, it took the disputed facts (and the inferences from them) to completely disqualify Coast's experts, despite the fact that the evidence was overwhelming that Coast had established "fact of damage" or "causation" as to its inventory being slashed and its franchise being terminated all due to MBUSA's illegal motives. Compare 40a to 40a-54a.

In addition, both the district court and the circuit court do not account in any way for the fact that MBUSA's entire defense was built solely on the subjective credibility of its summary judgment affiant/employee Ray Dupell and on subjective implications regarding MBUSA's yet unsubstantiated "allocation procedures." Notwithstanding,

the fact that MBUSA's unsubstantiated "allocation procedure" was premised solely on the credibility of a single individual and his after-the-fact testimony of the subjective and undocumented "allocation procedure," the district court conducted a "trial by affidavit"—something this Court expressly forbids in cases such as this. *See Poller v. Columbia Broadcasting Sys., Inc.* 368 U.S. at 473, 82 S. Ct. at 491, 7 L. Ed. 2d at 464.

Given the lack of substance, accuracy and credibility of MBUSA's arguments and view of the evidence, Coast responded:

> In particular, MB USA contends (and Coast does not dispute) that its dealers' allocations were based, at least in part, on their previous retail sales [to customers]. MB USA Br. at 1, 12. Yet MB USA argues that Coast's allocations were reduced because of deficiencies in its wholesale purchases [from MB USA]. See MB USA Br., at 16, [Ray] Dupell Cert. Ex. A. Yet the sole page of documentary evidence upon which MB USA relies in this context in fact corroborates Shansab's contentions. *In 1995 Coast sold more cars that it was allocated, and yet its allocation was cut by 10 percent in 1996.* [Ray] Dupell Cert A. Likewise, in 1997, Coast again sold more cars than it was allocated and, again, its allocation was cut. Id.

(emphasis supplied) *Memorandum in Opposition to Mercedes-Benz USA, LLC's Motion to Strike the Opinions of Howard M. Markovitz and John A. Del Roccoli and to Bar Their Testimony at Trial* dated September 15, 2005

at p.2. (hereinafter "Coast *In Limine* Op at p. "__""), *Memorandum In Opposition to Mercedes-Benz USA LLC's Motion For Summary Judgment* dated September 29, 2005 at p. 7-8 (hereinafter "Coast S.J. Op. at p. __").

The district court did not apply this Court's summary judgment standard regarding the handling of these factual disputes and inferences the parties urged be drawn from the facts. 40a-54a. Instead, it impermissibly resolved these credibility issues in favor of MBUSA, and improperly dismissed Coast's claims.

The Third Circuit, in affirming the district court, also failed to apply this Court's standards, and apparently disregarded the evidence refuting MBUSA's defense arguments. Coast pointed out that MBUSA's own records confirmed that Coast's inventory had been slashed:

> . . . those [allocation] charts [submitted by MBUSA] tend to prove that MBUSA did in fact "[slash] the number of New Vehicles allocated to Coast" in 1995, the very year in which Coast contends that MBUSA did so. In particular, those [allocation] charts [submitted by MBUSA] reflect that MBUSA allocated to Coast 247 new vehicles in 1994, and 187 vehicles in 1995-a reduction of nearly 25 percent. *See* JA 858 (1994 allocation), JA 856 (1995 allocation).

Reply Brief of Appellant dated June 22, 2009 at p. 3; *compare*, 4a, 6a, 40a-54a.

Contrary to its duty not to selectively decide facts at the summary judgment stage, the district court latched onto one purported "fact" advanced by MBUSA to the exclusion of all others in the record. 51a. This was the statistic cited by the district court that Coast was allocated 187 vehicles by MBUSA in 1995 but supposedly only purchased 171 of the 187—allegedly leaving "16 units" that Coast did not purchase. 51a. Without justification, and contrary to this Court's precedents, the district court and the circuit court drew negative inferences against Coast from this. This reliance is misplaced, because Coast actually sold 191 vehicles in that same year (1995), which exceeds the 187 vehicles that MBUSA claimed it had allocated. In fact, in two of the four years from 1995 through 1999, Coast sold more vehicles than MBUSA had allocated to it, corroborating that Coast could not fulfill the needs and wants of its customers from MBUSA's chosen allocation. Nevertheless, both the district court and the circuit court improperly resolved this factual dispute in MBUSA's favor and gave it the benefit of all permissive inferences. This flatly contradicts this Court's precedents on the appropriate summary judgment standard in antitrust cases. Accordingly, this Petition should be granted and this Court should address this discrepancy.

POINT III

The district court and circuit court have improperly manufactured a new rule requiring an expert whose sole purpose is damages calculation to independently verify liability.

The deposition of Coast's damages calculation expert Markovitz confirmed that the methodology he used and the data he relied upon were consistent with caselaw as accepted means of calculating lost profits:

> [Markovitz:]
>
> . . . I based my report on the amount—[Coast's] percentage of the sales in the New York Region in 1994, when [Shansab] claimed was the last year he received a fair allocation of cars, and in increasing his unit sales every year after that, based on the percentage increase of sales in the New York Region, I came up with the number [units]he would have received . . . and then I compared it to the number of units he would have received to the total units in the region and his percentage share was close to what it was for 1994 to verify that I had done the projection correctly . . .

48a.

There was no evidence presented nor argument made with citation to caselaw, treatise or rebuttal expert that relying upon sales data in calculating lost profits

as Markovitz did was anything other than a reliable, accepted methodology. 45a-46a. *See Antitrust Law Developments (Sixth)* (ABA Section of Antitrust Law 2007) "Proof of Damages—Calculation of Damages" at p. 842, stating:

> Lost profits also have been established by estimating the market share a plaintiff would have had but for a defendant's violations and then determining, based on the size of the market and the plaintiff's likely profit margin, the total profits the plaintiff would have earned if the estimated market share had been achieved. In most cases, the estimated market share has been determined by reference to the plaintiff's market share before or after the violation. . . . [fn 178].

See also, Antitrust Law Developments, p. 842, footnote 178 (citing *See e.g. Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 106 & n. 11 (1969)).

Both the district court and circuit court misapplied the existing caselaw when they alleged that Markovitz did not consider "circumstances surrounding Coast's operations" in making his calculations. 4a, 45a. Using 1994 as a baseline, Markovitz's methodology factored in or took into account "circumstances surrounding Coast's operation" from which to calculate what would be Coast's appropriate share of the increasing regional sales. *Bob Willow Motors, Inc. v. General Motors Corp.*, 872 F. 2d 788, 797 (7th Cir. 1989). Though none was cited by the lower courts, any alleged reason why 1995 through 1999 should have been different than 1994 is a matter of cross-examination, not preclusion.

In this way, Markovitz's methodology is exactly the analysis that the caselaw approves of in such circumstances:

> [Willow's expert] relied on actual sales by plaintiff during those periods when sufficient vehicles were delivered to the plaintiff dealership by the defendant manufacturer. [Willow's expert] further relied on national and regional sales to determine sales trends and market conditions in his efforts to determine those sales which plaintiff should have experienced for the pertinent periods . . .

Bob Willow Motors, Inc. v. General Motors Corp., 872 F. 2d at 797.

The Third Circuit's decision regarding Coast's experts in this case hinges entirely on one sentence consisting of two parts. 4a. That sentence is: "Given Markovitz's failure to [1] independently verify Shansab's claims of unfair allocation or [2] analyze Mercedes' allocation procedures . . ." that the district court did not abuse its discretion in barring Markovtiz. Thus, Markovitz's damages calculation opinion was barred because he allegedly had failed to do two specific things.

Starting with the second-half of Third Circuit's pivotal sentence, it was confirmed in the summary judgment record that MBUSA had not substantiated

the existence of any objective "Mercedes' allocation procedures":

> Nowhere in its pending motion papers does MB USA explain with any degree of clarity why it is that Coast's allocation decreased while its competitors' were multiplying. Nor has MB USA presented a shred of documentary evidence reflecting its allocation policies, or that Coast was treated in compliance with those policies. And MB USA has conceded that there is no such evidence forthcoming. See MB USA Br. At 9.

Coast *In Limine* Op at p. 1., Coast S.J. Op. at p. 7.

Coast added that MBUSA's attempted explanation at substantiating a so-called "allocation procedure" or "allocation policy" was no more than "vague, after-the-fact testimony, rather than detailed contemporaneous documents," and was composed of "at least one subjective factor that even MBUSA's own witness could not quantify." *Reply Brief of Appellant* dated June 22, 2009 at p. 9.

Since MBUSA could not substantiate an "allocation procedure" and would not confirm what precise "procedure," if any, was applied to Coast, it would be irrelevant if not foolish to try to comment on whether MBUSA's unsubstantiated "allocation procedure" was philosophically fair or unfair – there is no evidence that it or its espoused principles were ever even applied. Such an inquiry certainly would be of no help in trying to

calculate lost profits from lost sales—and the issue was nothing more than a red herring.

In contrast, Markovitz's specific charge was to calculate lost profits which he did using the traditionally recognized means. In the often-cited automobile dealer case of *Bob Willow Motors, Inc. v. General Motors Corp.*, the Seventh Circuit rejected precisely the same argument that MBUSA has made against Coast regarding the manufacturer's alleged "procedures." The Seventh Circuit rejected the argument that plaintiff Willow's expert's total unfamiliarity with General Motors' distribution procedures rendered his damages expert opinion on lost sales and profits inadmissible. In fact, Willow's expert had determined Willow's lost profits exactly as Markovitz did – by comparing Willow's sales to that of his competitors – and not by relying on "distribution" or "allocation" procedures. *Bob Willow Motors, Inc. v. General Motors Corp.*, 872 F. 2d 797.

Accordingly, it was improper for the lower courts to simply presume both the existence of and the relevance of unsubstantiated "allocation procedures." The caselaw and evidence supports Coast's expert. Neither MBUSA nor the lower courts cited any authority that contradicted Markovitz's methodology or the accuracy of his data. To estimate lost profits using an accepted methodology and reliable data from the record is not "speculation." Markovitz was not a liability or "causation" expert in the first instance and his charge was not to "critique" MBUSA's illusory procedures.

Indeed, *Story Parchment, J. Truett Payne, et. al.*, all discuss that a court may not penalize the antitrust

plaintiff concerning the precision of its damages estimates in the case where the antirust wrongdoer himself has obfuscated or made damages more difficult to ascertain from the nature of the wrong. MBUSA's failure to substantiate an allocation procedure and the absence of any evidence that any such procedure was specifically applied to Coast should have been taken by the lower courts as forming a negative inference against MBUSA, not providing a weapon against Coast.

Instead, on "trial by affidavit" the district court and the Third Circuit turned matters upside down and took what is likely to be an *actual element of the antitrust wrongdoing itself* and held it decidedly against Coast and against its damages calculation experts. Such anomalous results are why this Court expressly prohibits the lower courts from deciding facts at the summary judgment stage, in turn, conducting a "trial by affidavit," particularly in an antitrust context where credibility and motive are key. There are simply too many variables to consider and decide.

Then there is the first part [1] of the Third Circuit's above pivotal sentence.

The Third Circuit ascribed to Markovitz a "failure to independently verify Shansab's claims of unfair allocation." This is the same as Third Circuit's mischaracterization of the evidence as a "naked contention" (6a) in the "summary judgment" section of the decision that followed.

Markovitz was offered as a *damages calculation expert* and *not a liability expert*, and was permitted to assume Coast's allegations concerning liability. Further, the Third Circuit ignores the summary judgment record when it characterizes the position taken by Coast as a "naked contention" (6a) or otherwise somehow less than fully corroborated by the record, at least for the purposes of summary judgment.

As the district court also found for the purposes of summary judgment, MBUSA expressly warned Shansab and others that Coast *would be – not might be – punished* and that his allocation of vehicles would be reduced. The fact that Coast's allocation was then slashed from 247 vehicles in 1994 down to 187 in 1995 is not a figment of Shansab's imagination. It is a matter of numerical fact and whether that reduction is *fair or unfair* requires passing judgment on MBUSA's *motives* in light of all of the evidence, something the district court determined that it *could not and should not* do on summary judgment. 40a.

This Court has specifically held that such cases are for consideration by a jury and must not be conducted as a "trial by affidavit" in summary motions practice:

> . . . We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. [Fn 7] It is only when the witnesses are present and subject to cross-examination that their credibility and the

> weight to be given their testimony can be appraised. "*Trial by affidavit*" is no substitute for trial by jury, which so long has been the hallmark of "evenhanded justice."

(emphasis supplied) *See Poller v. Columbia Broadcasting Sys., Inc.* 368 U.S. 473, 82 S. Ct. 491, 7 L. Ed. 2d 464. Coast does not contend that there is necessarily a "different" standard for summary judgment in antitrust cases as such. Rather, since credibility and intent, which may only be weighed and decided by a jury, are likely to be contested elements, it would be to fair say that antitrust cases are inherently less susceptible to being summarily dismissed.

The record is clear that Coast's position that MBUSA's retaliation began after 1994 was not Shansab's personal feeling, but rather an observation based upon the *direct threats* made to him in 1994 which were immediately followed by the slashing of Coast's inventory, initially by 25% in 1995. This was in the backdrop of Shansab's competitors' allocations and New York Region sales growing rapidly (doubling from 1995 to 1998) while his allocation was choked until the time of Coast's termination. The district court found that the matter of MBUSA's motive – even in the exercise of objective policies such as termination of Coast's franchise – was for the jury to decide. 40a.

This Court has consistently and repeatedly held that antitrust plaintiffs are "traditionally" excused "from an unduly rigorous standard of proving antitrust injury":

> Petitioner . . . asks us to consider the sufficiency of its evidence in light of our traditional rule excusing antitrust plaintiffs

from an unduly rigorous standard of proving antitrust injury. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 395 U. S. 123-124 (1969), for example, the Court discussed at some length the fixing of damages in a case involving market exclusion. We accepted the proposition that damages could be awarded on the basis of plaintiff's estimate of sales it could have made absent the violation:

> . . . the factfinder may...conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." *Bigelow v. RKO Pictures, Inc., supra,* at *327 U. S. 264*. [citation omitted] *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 282 U. S. 561-566* (1931)." *Ibid.*

In *Bigelow v. RKO Radio Pictures, Inc., 327 U. S. 251* (1946), relied on in *Zenith*, . . . We explained:

> "[A]ny other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so

> effective and complete in every case as to preclude any recovery by rendering the measure of damages uncertain . . . the it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery." [Bigelow] 327 U.S. at *327 U. S. 264*-265.
>
> [and . . .] it does not "come with very good grace" for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted. [citation omitted] *Accord, Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, 282 U. S. 563 (1931) . . .

J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 565-567, 101 S. Ct. 1929, 68 L. Ed. 2d 450-451.

The record does not demonstrate that Coast received similar consideration from the district court or circuit court.

While Coast does not dispute the proposition that a district court has discretion under R. 702 to admit or to bar testimony, that discretion certainly does not extend to committing errors of law. 41a. The lower courts did not correctly evaluate antitrust "causation" and did not properly distinguish it from "damages calculation." Likewise, mischaracterization of an expert's testimony or misunderstanding of an expert's scope is not within the district court's discretion either. It was not within the district court's discretion to require that Coast's

damages calculation experts independently confirm antitrust "causation" (which is an element of liability), in their respective damages opinions. 4a. Under R. 702, expert testimony is admissible if it is relevant and reliable. No legitimate challenge could have been made to Coast's damages calculation experts' opinions when considered within their proper scope and role. *See Jaasma v. Shell Oil Company LLC*, 412 F3d 501 (3rd Cir. 2005)(Third Circuit finds abuse of discretion where district court misunderstands the purpose of the expert testimony). The caselaw supports Coast's damages calculation expert's reliance on sales data to compute lost profits.

Effectively, Coast's antitrust summary judgment position on antitrust "causation" was subjected to a R. 702/*Daubert* scrutiny, despite the fact that the position on "causation" was not even being advanced by an expert in the first place. 41a. F.R.E. 702 was not intended to be used to resolve such factual disputes:

> When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on 'sufficient facts or data' is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

Advisory Committee Note to Federal Rule of Evidence 702.

This is not a case of non-qualified pseudo experts or alleged "junk science."

The qualifications of Coast's experts—an accountant on the one hand (Markovitz) and an economist on the other hand(Dr. Del Roccili)—were not criticized by the district court or the Third Circuit. As such, these damages experts were recognized to be engaged in providing calculations that were well-within their areas expertise. These damages experts were relying on years of historical documents and financial data which are of the kind approved of by the caselaw as a basis for computing similar damages claims—financial statements, tax returns, financial data including the sales figures from Coast and Coast's Mercedes-Benz competitors.[5] Ultimately, Markovitz compared Coast's sales to the sales of its competitors. Markovitz's report, submitted in 2005, opined on damages for 1995 through 1999, over which time New York Region Mercedes Benz Sales more than doubled. Markovitz's damages calculations resulted from nothing more (and nothing less) than the application of accepted, if not routine, methodologies for calculating lost profits from lost sales. *Bob Willow Motors, Inc. v. General Motors Corp.*, 872 F. 2d at 797. Certainly, it was well within the long-established parameters for a damages calculation in *Story Parchment*, *Zenith Radio Corp. v. Hazeltine Research* and others.

5. Demonstrating the detail of the documents at his disposal, Markovitz relied upon for his opinion the "Sheft Kahn" price-fixing reports cited by the district court in the related consumer class action. *In Re. Mercedes Benz Antitrust Litig.*, 2006 U.S. Dist. LEXIS 51202 *37-38.

Markovitz was more than entitled to rely upon Coast's competitor's sales to calculate Coast's damages from lost sales:

> To calculate damages, Willow had to estimate the number of cars it would have sold – and thus what its profits would have been – had GM not engaged in unconscionable practices. It was completely reasonable to look to national sales trends for this information. In a similar case, an expert witness estimated the number of cars a dealer would have sold in the absence of discriminatory allocation by looking to the dealer's competitor. *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510|, 517-18| (10 Cir. 1976) . . . Moreover, any uncertainty regarding the number of cars Willow would have sold is attributable to GM's unconscionable practices. Thus, GM "is in an unfavorable position to complain of an uncertainty created by its own wrongdoing." *Randy's*, 533 F.2d at 518.

(emphasis supplied) *Bob Willow Motors*, 872 F.2d at 798 (additional citation omitted); *see also*, *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.* 533 F.2d 510, 518 (10th Cir 1976)("And, where the defendant's wrongdoing created the uncertainty, it must bear the risk of that uncertainty and cannot complain. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 90 L. Ed. 652, 66 S. Ct. 574 (1946)")

In *Jay Edwards, Inc. v. New England Toyota Distributor, Inc.*, this Court denied review where the First Circuit had affirmed a damages award, where, in relevant part, only the plaintiff's principal testified as to damages, which he fixed at an amount disproportionate to his actual profits, based in large part on the sales of only one other dealer. *Jay Edwards, Inc. v. New England Toyota Distributor, Inc.*,708 F.2d 814, 819, 820 n.4, 821-22. (1st Cir. 1983), *cert. denied*, 464 U.S. 894 (1983); *see also, Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1221 (9th Cir. 1997)("Whether that 'unaffected' business properly compares to the relevant market presents a question of fact for the jury."); *see also, Synfy Enters. v. American Multicinema, Inc.*, 793 F.2d 990, 1002-03 (9th Cir. 1986) ("Comparability [of competing businesses] is a question of fact.").

Given the context of the district court's error in confusing liability and damages, Coast disagreed with the Third Circuit's conclusion that its review of the district court's ruling on Coast's experts was limited to an "abuse of discretion." 3a. *Cf. Reply Brief of Appellant* dated June 22, 2009 at 1-2.

However, even if an "abuse of discretion" standard was the appropriate standard of review, the district court's ruling should have been reversed. As the court held in *Pineda v. Ford Motor Co.*, 520 F.3d 237 (3rd Cir. 2008), "[a]n abuse of discretion arises when the District Court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *Id.* at 243 (quoting *In re TMI Litig.* 193 F.3d 613, 666 (3rd Cir. 1999)(internal quotation marks omitted)).

The district court's ruling entailed, at a minimum, (1) two "errant conclusion[s] of law" (its disregard for *Kumho Tire v. Carmichael*[6] and *Jaasma*[7]),(2) one "improper application of law to fact" (its requiring Markovitz to prove causation), and (3) one "clearly erroneous finding of fact"(its determination that Coast had not proven causation contrary to its express findings that Coast had sufficiently overcome summary judgment due to questions of fact on MBUSA's motives).

This Court in *Daubert* made it clear that the adversarial process and the jury – and not the district court as a matter of law – were still the means to resolve these types of genuine factual disputes. *Daubert v. Merrell Dow*, 509 U.S. at 596, 113 S. Ct. 2798, 125 L. Ed. 2d 484. ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. . . ."). Here, the district court and circuit court, contrary to this Court's prior decisions, improperly curtailed that process. Accordingly, this Court should grant this Petition and review this matter.

6. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 158, 119 S. Ct. 1167, 1179, 143 L. Ed. 2d 238, 256 (1999) (gatekeeping inquiry must be "tied to the facts" of a particular "case.")

7. As previously referenced, courts have indeed held that a district court's misunderstanding the purpose of expert testimony is, in and of itself, an abuse of discretion. *See Jaasma v. Shell Oil Company LLC*, 412 F3d 501(district court misunderstanding of the purpose of the expert testimony warrants finding that district court abused its discretion).

POINT IV

The district court's and circuit court's decisions greatly undermine the important public policies behind civil antitrust enforcement.

This Petition should also be granted because this matter involves an issue of nationwide importance – civil antitrust enforcement. This Court has gone to great lengths to emphasize the importance of the antirust plaintiff's right to trial by jury and that arbitrary rules which infringe upon that right would be akin, as stated in *Story Parchment*, to sanctioning "legalized robbery," enabling "parties to profit by, and speculate upon, their own wrongs," and "encourag[ing] violence, and invit[ing] depredation." These words speak for themselves. Not only has Coast's right to trial by jury been stripped, this Court's goals of antitrust punishment and deterrence have been badly undermined in this case and beyond.

The disposition of this Petition also affects whether or not antitrust whistleblowers, such as Shansab, will have reason to believe in the future that they will get their day in court if they risk their financial livelihood in resisting a price-fixing conspiracy. The lower courts' decisions in this matter reward antitrust wrongdoing and lessen deterrence. With these decisions, antitrust wrongdoers now have far less reason to fear that they will have to ever face a trial by jury, since the burden of proving "causation" and "damages" has now been made far greater than this Court intended.

As news of this circulates—future whistleblowers—now advised of minimal prospects of recovery—will be deterred from ever coming forward by the risk of being pauperized and left with the choice of forfeiting their businesses or joining a price-fixing conspiracy. Resistance to participation in price-fixing schemes under the rules enunciated by the Third Circuit will be tantamount to economic suicide. As was evident with the August 29, 1999 article in *The New York Times*, absent the account of whistleblowers like Shansab, the market will not made aware of such conspiracies and consumers will be unknowing victims. The multiyear Department of Justice investigation that followed the *Times* article and the consumer class actions, would not have been possible without Shansab. Therefore, not only is civil enforcement deterred, antitrust law enforcement activity is hampered.[8]

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8. On December 25, 2003, The *New York Times* published an article entitled "U.S. Will Not Pursue Price-Fixing Case Against Mercedes Dealers" and reported that

> . . . federal prosecutors in New York had recommended indictments of the [target New York Region Mercedes Benz] dealers . . . The prosecutors had issued letters to the dealers indicating they faced imminent indictments . . . When more than a dozen lawyers for Mercedes and some of the largest dealers came [to Washington] recently in a last-ditch attempt to persuade the Justice Department not to indict their clients, they had little reason to think they would prevail, one lawyer recalled. But they did. . . . Lawyers involved in the case said the Justice Department decided to end the case after the senior career official overseeing criminal antitrust matters

(Cont'd)

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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(Cont'd)

> concluded that the government could not show "beyond a reasonable doubt" that the dealers' arrangement amounted to a criminal conspiracy.

(emphasis supplied) The fact that the Department of Justice cited the "beyond a reasonable doubt" standard as the reason the anticipated indictments were not forthcoming, strongly suggests that the DOJ did not wish to suggest that civil punishment under the "preponderance of the evidence" should affected by its decision.

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JANUARY 25, 2010

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-4608

MERCEDES-BENZ USA, INC.

v.

COAST AUTOMOTIVE GROUP, LTD.;
TAMIM SHANSAB,

Appellants

v.

DAVID MICHAEL MOTOR CAR CORP;
RAY CATENA MOTOR CARS CORP;
CONTEMPORARY MOTOR CARS, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civ. No. 2-99-cv-03121)
District Judge: William H. Walls

Submitted Under Third Circuit L.A.R. 34.1(a)
December 15, 2009
Before: SLOVITER, JORDAN and WEIS,
Circuit Judges.

(Filed: January 25, 2010)

Appendix A

OPINION

WEIS, *Circuit Judge*.

Defendants appeal from the District Court's order excluding the testimony of two expert witnesses and granting summary judgment to plaintiff on certain of the defendants' counterclaims. We find that the testimony was properly excluded and that defendants were unable to prove their counterclaims in the absence of that testimony. Accordingly, we will affirm.

I.

Because we write only for the parties, we need not recite in detail the facts or complex procedural history of this matter. It is sufficient to note that, after several years of an apparently antagonistic relationship, Mercedes-Benz USA, Inc., terminated its dealership agreement with Coast Automotive Group, Ltd., and filed this lawsuit, seeking injunctive relief and damages. Coast countersued, claiming, *inter alia*, that Mercedes had implemented a "price-fixing" scheme and that, in retaliation for Coast's refusal to adhere to the scheme, had reduced the number of vehicles allocated to Coast for sale. Coast alleged damages in the form of lost profits and a reduction in the value of the franchise.

At the close of discovery, Mercedes moved to exclude the opinions and testimony of Coast's expert witnesses on damages. Simultaneously, Mercedes moved for summary judgment on Coast's counterclaims,

contending that, in the absence of these experts' opinions, Coast had no evidence of damages and, therefore, the counterclaims should not proceed to trial.

The District Court found the proffered expert opinions unreliable, excluded the testimony, and thereafter granted summary judgment to Mercedes on its counterclaims. Coast timely appealed.[1]

II.

A district court's ruling as to the admissibility of evidence is reviewed under an abuse of discretion standard. *General Elec. Co. v. Joiner*, 522 U.S. 136, 142-43, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). Under Federal Rule of Evidence 702, expert testimony must be both reliable and relevant to be admitted. A reliable opinion is "based on 'the methods and procedures of science' rather than on 'subjective belief or unsupported speculation.'" *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 742 (3d Cir. 1994) (citing *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 590, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)). To be relevant, an opinion must actually "assist the trier of fact." *Id.* at 742-43 (citing Fed. R. Evid. 702) (requiring "connection" or "fit" between proffered testimony and "particular disputed factual issues in the case") (citing *United States v. Downing*, 753 F.2d 1224, 1227 (3d Cir. 1985)). The District Court

1. The District Court had jurisdiction over this case under 28 U.S.C. §§ 1331 and 1337(a). We have jurisdiction to review the District Court's final judgment pursuant to 28 U.S.C. § 1291.

acts as a "gatekeeper," preventing opinion testimony that does not meet these requirements from reaching the jury. *Daubert*, 509 U.S. at 592-95.

After a thorough review of expert Markovitz's report and deposition testimony, the District Court agreed with Mercedes that Markovitz "made no computations of automobile allocations based on Coast's actual sales and in fact did not look at any of the circumstances surrounding Coast's operation to make an assessment of what constituted a reasonable allocation." Rather, he accepted without question the assertion of Coast's owner-operator, Tamim Shansab, that Coast's vehicle allocations from 1995 through 1999 were unfair.

Given Markovitz's failure to independently verify Shansab's claims of unfair allocation or analyze Mercedes' allocation procedures, particularly where the facts belied the expert's conclusions, the District Court did not abuse its discretion in determining that Markovitz's opinion was unreliable for purposes of Rule 702. *See, e.g.*, *Oddi v. Ford Motor Co.*, 234 F.3d 136, 156 (3d Cir. 2000) ("*Daubert* . . . require[s] more than [a] haphazard, intuitive inquiry"); *Elcock v. Kmart Corp.*, 233 F.3d 734, 755 (3d Cir. 2000) (expert opinion not grounded in facts of case is a "castle made of sand") (citing *Benjamin v. Peter's Farm Condo. Owners Ass'n*, 820 F.2d 640 (3d Cir. 1987)); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d at 762 (expert testimony based solely upon plaintiff's unverified self-report of injury was properly excluded).

Nor do we find an abuse of discretion in the Court's exclusion of expert Del Roccili's report, which purported to calculate the value of Coast's franchise at the time of its termination absent the supposedly unfair vehicle allocation. As the District Court correctly noted, Del Roccili's opinions were based on the projected profits set forth in Markovitz's report and, as such, were equally unreliable. *See id.* at 748 (where underlying data lack "probative force and reliability . . . [an] opinion . . . rest[ing] entirely upon them must be excluded" (citing *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1245 (E.D. N.Y 1985)).[2]

III.

Coast argues that the District Court erred in granting summary judgment because the excluded expert testimony sought only to establish the amount of damages — not an element of antitrust liability — as opposed to the the fact that damages had been incurred. We exercise plenary review over this question. *See Saldana v. Kmart Corp.*, 260 F.3d 228, 231, 43 V.I. 361 (3d Cir. 2001).

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2. Coast apparently argues that, because Mercedes failed to introduce expert testimony contradicting that of Markovitz and Del Roccili, Mercedes' *Daubert* challenge must fail. This argument misses the mark. As the party proffering expert testimony, Coast bore the burden of demonstrating that the testimony satisfied the requirements of Rule 702. *See Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995).

Appendix A

In order to succeed on an antitrust claim, a plaintiff "must prove an antitrust violation, fact of damage or injury, and measurable damages." *Danny Kresky Enters. Corp. v. Magid*, 716 F.2d 206, 209 (3d Cir. 1983); *see also Van Dyk Research Corp. v. Xerox Corp.*, 631 F.2d 251, 255 (3d Cir. 1980) ("plaintiff has the burden of proving that the established illegality was a material cause of the injury").

Coast's naked contention that Mercedes' allocation method was unfair and resulted in reduced profits falls well short of the nexus required by the Clayton Act and relevant case law. *See, e.g.*, *Van Dyk*, 631 F.2d at 255-56 (plaintiff that failed to establish causal relationship between its financial difficulties and defendant's alleged antitrust violations did not prove fact of injury due to claimed violations). Accordingly, we hold that the District Court correctly concluded that Coast failed to demonstrate the "fact of injury." The grant of summary judgment, therefore, was proper.

The order of the District Court will be affirmed.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED JULY 25, 2007

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No.: 99-3121 (WHW)

MERCEDES-BENZ U.S.A. LLC,

Plaintiff/Counterclaim Defendant,

v.

COAST AUTOMOTIVE GROUP, LTD., and TAMIM SHANSAB,

Defendants/Counterclaimants/
Third Party Plaintiffs,

v.

DAVID MICHAEL MOTOR CARS CORP., RAY CATENA MOTOR CARS CORP., and CONTEMPORARY MOTORCARS, INC.,

Third Party Defendants.

Walls, Senior District Judge

Defendant/counter-claimant/third-party plaintiff Coast Automotive Group Ltd. ("Coast") moves for reconsideration of this Court's September 29, 2006

opinion which, inter alia, granted plaintiff, Mercedes-Benz USA LLC's ("MBUSA"), motion to strike the expert testimony of Coast's damages experts and granted summary judgment in favor of plaintiff and third-party defendants (other regional Mercedes-Benz dealers) on counts five through ten of Coast's counterclaims. In addition, third-party defendant Ray Catena Motor Cars Corp. ("Ray Catena") now moves for summary judgment on counts five through ten of Coast's counterclaim asserted against Ray Catena.

I. FACTS AND PROCEDURAL BACKGROUND

This litigation primarily concerns the validity of MBUSA's termination of the Mercedes-Benz franchise owned by Coast. Coast alleges that the franchise agreement was wrongfully terminated and also alleges that before the agreement was terminated, Coast was harmed by receiving an unfair allocation of Mercedes-Benz vehicles to sell. Specifically, Coast alleges that it received an unreasonable allocation of vehicles as punishment for Coast's refusal to engage in a price fixing conspiracy with MBUSA and other regional Mercedes-Benz dealers. Coast's counterclaims include counts against MBUSA and third-party defendants (other regional Mercedez-Benz dealers) for damages resulting from this unfair allocation.

Appendix B

A. In re Mercedes-Benz Antitrust Class Action

Also before this Court is a class action, *In re Mercedes-Benz Antitrust Litig.*, which involves many of the same individuals and entities as the Coast matter. On July 26, 2006, this Court issued an opinion in the class action. That opinion denied the motions for summary judgment on an alleged price fixing conspiracy brought by defendants in that case, and in so doing, discussed the testimony of Tamim Shansab, the dealer principal of Coast. Shansab provided testimony concerning his personal experiences at dealer meetings and statements made to him by at least one MBUSA employee, which tended to support the allegation of concerted action on behalf of the defendants. This Court found that Shansab's testimony, along with other evidence offered by plaintiffs, was sufficient to create a genuine issue of fact for trial. Accordingly, the Court denied defendants' motions for summary judgment in the class action.

B. September 29, 2006 Opinion

On September 29, 2006, this Court issued an opinion in the matter at hand. First, this Court granted plaintiff's motion to exclude the expert testimony of Howard M. Markovitz and John A. Del Roccili. Both experts' reports concerned damages resulting from the alleged misallocation of vehicles to Coast. The Court held that Markovitz's testimony did not satisfy the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals*,

509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), for the admissibility of expert evidence because Markovitz based his calculations on Shansab's assertions that Coast received an unfair allocation of vehicles from 1995 to 1999 and failed to conduct any independent factual or analytical inquiry as to the circumstances surrounding Coast's operation to determine what would constitute a reasonable allocation. The Court also identified specific problems with Markovitz's report, including Markovitz's failure to note that in 1995 — the first year Shansab alleges MBUSA punished Coast by providing an unfair allocation of cars — MBUSA actually offered Coast more cars than Coast purchased. The Court granted MBUSA's motion to strike Markovitz's expert testimony. The Court also granted MBUSA's motion to strike Del Roccili's expert testimony because Del Roccili based his conclusions on the profits projected by Markovitz.

Finding the experts' reports inadmissible, this Court held that Coast could not establish damages associated with the alleged discriminatory allocation of automobiles. The opinion noted that counts five through ten of the counterclaim were premised on the alleged harm resulting from the misallocation of vehicles. Accordingly, the Court granted summary judgment in MBUSA and third-party defendants' favor on all of these counts, thereby dismissing all claims against the third party defendant dealers (with the exception of Ray Catena, which did not move for summary judgment at that time).

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Coast seeks reconsideration of the Court's September 29, 2006 opinion. Coast maintains that because this Court denied defendants' motion for summary judgment in the class action primarily because of factual assertions made by Shansab, it was inconsistent for the Court to strike the expert reports in this matter on the basis that the experts relied on Shansab's factual assertions. Coast also argues more generally that this Court's application of the *Daubert* standard was unduly restrictive.[1]

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1. In support of its motion for reconsideration, Coast submitted a reply brief. Third-party defendant David Michael then filed a letter pointing out that the local rule on motions for reconsideration makes no provision for reply briefs. Coast responded by filing a letter challenging the assertion that reply briefs are not permitted under the local rule for such motions and citing cases where courts in this District, including this Court, have allegedly accepted such reply briefs without any indication that permission was sought and received. As stated in this Court's opinion in the related class action, this Court reads L. Civ. R. 7.1(i) as making no provision for reply briefs (without the Court's permission). (November 13, 2006 Opinion, filed in 99-cv-4311.) This Court is not alone in this interpretation of L. Civ. R. 7.1. *See* Allyn Z. Lite, *N.J. Federal Practice Rules*, Comment 6(c) to L. Civ. R. 7.1 (2007). To the extent Coast has any legitimate argument that it believed the Court would accept its reply brief, the Court has reviewed the reply brief and concludes that nothing contained therein would alter the outcome of this decision. However, going forward, all parties are on notice that this Court will *not* consider any reply briefs filed in connection with a motion for reconsideration unless permission to do so is explicitly sought and granted.

In a separate motion, Ray Catena, a third-party defendant in the case at hand who did not move for summary judgment earlier, now moves for summary judgment on counts five through ten of Coast's counterclaims. Ray Catena argues that because the Court dismissed those counts as to the other third-party defendants in light of Coast's inability to prove damages, the Court should dismiss the claims against Ray Catena, which is similarly situated.

II. MOTION FOR RECONSIDERATION

A. Legal Standard

Under Fed. R. Civ. P. 59(e), a litigant may move to alter or amend a judgment within ten days of its entry. Similarly, L. Civ. R. 7.1(i) allows a party to seek reconsideration of "matters or controlling decisions which counsel believes the Judge or Magistrate Judge has overlooked." The Third Circuit has held that the "purpose of a motion for reconsideration . . . is to correct manifest errors of law or fact or to present newly discovered evidence." *Max's Seafood Cafe ex rel. Lou-Ann v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999) (quoting *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985)) (internal quotations omitted).

Reconsideration motions, however, may not be used to relitigate old matters, nor to raise arguments or present evidence that could have been raised before the entry of judgment. *P. Schoenfeld Asset Mgmt. L.L.C. v. Cendant Corp.*, 161 F. Supp. 2d 349, 352 (D.N.J. 2001);

11 Charles A. Wright et al., Federal Practice and Procedure § 2810.1 (2d ed. 2006). "A party seeking reconsideration must show more than a disagreement with the Court's decision, and recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden." *Gutierrez v. Ashcroft*, 289 F. Supp. 2d 555, 561 (D.N.J. 2003) (quoting *G-69 v. Degnan*, 748 F. Supp. 274, 275 (D.N.J. 1990)).

Such motions will only be granted where (1) an intervening change in the law has occurred, (2) new evidence not previously available has emerged, or (3) the need to correct a clear error of law or prevent a manifest injustice arises. *North River Ins. Co. v. CIGNA Reins. Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995). Because reconsideration of a judgment after its entry is an extraordinary remedy, requests pursuant to these rules are to be granted "sparingly," *Yurecko v. Port Auth. Trans-Hudson Corp.*, 279 F. Supp. 2d 606, 608 (D.N.J. 2003); *NL Indus. Inc. v. Commercial Union Ins. Co.*, 935 F. Supp. 513, 516 (D.N.J. 1996), and only when "dispositive factual matters or controlling decisions of law" were brought to the court's attention but not considered. *Yurecko*, 279 F. Supp. 2d at 609; *Pelham v. United States*, 661 F. Supp. 1063, 1065 (D.N.J. 1987).

B. Discussion

Coast argues that this Court committed a manifest error by striking Markovitz's and Del Roccili's reports and granting summary judgment on counts five through

ten of Coast's counterclaims. In its opinion, the Court noted that Markovitz relied on Shansab's assertions and assumptions concerning whether and when Coast started receiving an unfair allocation of vehicles. And the Court noted that Markovitz did so without conducting any independent analysis and without reviewing relevant allocation records. Moreover, Markovitz made unexplained assumptions, such as that the Coast allocations should have increased at a rate equal to the average of all Mercedes-Benz dealers in the tristate area. Accordingly, the Court found that Markovitz's report, and Del Roccili's report — which relied on Markovitz's — were unreliable and inadmissible under *Daubert*.

In its motion for reconsideration, Coast points to no law that was brought to the Court's attention but not considered. Rather, Coast argues with the Court's application of the law, specifically the standards under *Daubert* and Fed. R. Civ. P. 56 (summary judgment). Coast's arguments amount to nothing more than a disagreement with this Court's conclusion, which is not a proper basis for a motion for reconsideration. *Gutierrez v. Ashcroft*, 289 F. Supp. 2d 555, 561 (D.N.J. 2003) (quoting *G-69 v. Degnan*, 748 F. Supp. 274, 275 (D.N.J. 1990) ("A party seeking reconsideration must show more than a disagreement with the Court's decision, and recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden.").

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Additionally, reconsideration is not warranted in response to Coast's argument that the opinion in this case is inconsistent with that in the class action. The thrust of Coast's argument is that it is inconsistent for the Court to conclude that Shansab's factual allegations with respect to a price fixing conspiracy were sufficient to overcome summary judgment in the class action and then strike the expert testimony in this case on the basis that Markovitz relied on Shansab's factual assertions concerning an unfair allocation of vehicles. Essentially, Coast argues that if Shansab's assertions with respect to the existence of a conspiracy to fix prices were sufficiently reliable to overcome summary judgment, his assertions with respect to how his dealership was punished for failing to take part in the conspiracy must be sufficiently reliable to form the factual basis of Coast's experts' reports.

This argument neglects two crucial differences between these two opinions. First, the Court considered Shansab's allegations in different contexts and under different standards. In the class action, the Court reviewed Shansab's observations in relation to a motion for summary judgment, whereas in this case, the Court assessed whether Shasab's factual allegations were sufficient to support an expert opinion under *Daubert*. Second, the nature of those allegations were different. In the class action, the Court reviewed factual assertions based on Shansab's first-hand knowledge of what was said and done at certain meetings he attended. Here, Coast asks the Court to credit assertions by Shansab that incorporate analysis and subjective judgements

without providing any expert analysis of the facts supporting Shansab's assertions. As example, the experts did not merely rely upon factual statements such as 'Coast received X cars in X year,' but rather relied upon Shansab's assertions and assumptions that he received an unfair, unreasonable, or punishment allocation starting in 1995. Markovitz relied on these conclusions without conducting an independent analysis or providing a factual basis for his conclusions that Coast was damaged by unfair allocation.

Accordingly, Coast's effort at equating the content and impact of Shansab's factual assertions in these different contexts fails, as does its argument that the Court's opinions are inconsistent.

III. MOTION FOR SUMMARY JUDGMENT

A. Legal Standard

Summary judgment is appropriate where the moving party establishes that "there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Only the existence of a genuine and material factual dispute between the parties will defeat a motion for summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A factual dispute is genuine if a reasonable jury could find for the non-movant on that issue; it is material if, under the substantive law, that issue would affect the outcome of the suit. *See id.* at 248.

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The party moving for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record]" that show that there is no genuine material issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Once the moving party has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts" in question. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). To survive a motion for summary judgment, a nonmovant must present more than a mere scintilla of evidence in his favor. *Woloszyn v. County of Lawrence*, 396 F.3d 314, 319 (3d Cir. 2005). The opposing party must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings. *Saldana v. Kmart Corp.*, 260 F.3d 228, 232, 43 V.I. 361 (3d Cir. 2001).

At the summary judgment stage, the court's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249. In doing so, the court must construe the facts and inferences in the light most favorable to the non-moving party. *Curley v. Klem*, 298 F.3d 271, 276-77 (3d Cir. 2002).

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B. Discussion

Ray Catena argues that it is entitled to summary judgment on Counts five through ten of Coast's counterclaim because the Court has already held that Coast is unable to prove damages with respect to these counts and the Court has dismissed such counts against all other third-party defendants. According to Ray Catena, the inadmissibility of Coast's experts and Coast's inability to prove damages on these counts is the law of the case, and the Court should apply those holdings with respect to Ray Catena's request for summary judgment.

Coast does not appear to oppose Ray Catena's motion on substantive grounds.[2] Rather, Coast argues that Ray Catena's motion is not timely because it was filed over fifteen months after the filing deadline for such motions and two months after the Court had already ruled as to the other parties' motions.

The Court does not condone delinquent filings. It also does not condone the waste of judicial resources. Coast has provided no argument for how it can maintain counts five through ten against Ray Catena when the

2. Coast does not argue that its claims against Ray Catena differ in any relevant way from its claims against the other third-party defendants. Coast states in a footnote that it "disputes Catena's claim to the effect that the evidence against Catena is identical to that against the other counterclaim defendants," but also that this "claim is irrelevant for the purposes of the pending motion." (Coast's Opp'n Br. at 2 n.1.)

court has already found that Coast is unable to demonstrate any damages with respect to those claims. Because those are the only counts brought against Ray Catena, it makes no sense for Ray Catena to remain a party to this case. Moreover, the Court notes that although the deadline for filing dispositive motions passed long before Ray Catena brought this motion, as a general matter of procedure, a court may grant summary judgment at any time before trial. *See* Fed. R. Civ. P. 56(b); *Johnson v. United States*, 460 F.3d 616, 619 n.1 (5th Cir. 2006). Lest there be any doubt, this opinion does not suggest that the Court will accept late filings in the future in this or any other case. However, under the present circumstances, it would be a waste of resources to allow this case to proceed against third-party defendant Ray Catena.

IV. CONCLUSION

Accordingly, the Court denies Coast's motion for reconsideration. The Court grants Ray Catena's motion for summary judgment on counts five though ten of Coast's counterclaim. All claims against third-party defendant Ray Catena are hereby dismissed with prejudice.

s/ William H. Walls
United States Senior District Judge

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED SEPTEMBER 29, 2006

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No.: 99-3121 (WHW)

MERCEDES-BENZ U.S.A. LLC,

Plaintiff/Counterclaim Defendant,

v.

COAST AUTOMOTIVE GROUP, LTD., and TAMIM SHANSAB,

Defendants/Counterclaimants/
Third Party Plaintiffs,

v.

DAVID MICHAEL MOTOR CARS CORP, RAY CATENA MOTOR CARS CORP, and CONTEMPORARY MOTORCARS, INC.,

Third Party Defendants.

Walls, Senior District Judge

This Opinion addresses motions by (1) plaintiff Mercedes-Benz USA, LLC ("MBUSA" or "plaintiff") for partial summary judgment and to exclude the expert

testimony of Howard M. Markovitz ("Markovitz") and John A. Del Roccili ("Del Roccili"), (2) defendants/counter-claimants/third-party plaintiffs Coast Automotive Group Ltd. ("Coast") and Tamim Shansab ("Shansab") (collectively "Coast defendants") for partial summary judgment on their counterclaims, summary judgment on MBUSA's Amended Complaint and to exclude the expert testimony of Albert Parziale, and (3) third party defendants David Michael Motor Car Corp. ("David Michael") and Contemporary Motor Cars, Inc. ("Contemporary") for summary judgment on Coast defendants' counterclaims that relate to them.

FACTS AND PROCEDURAL BACKGROUND

The procedural history of this case is, to put it mildly, complex. Specifically, this litigation concerns the validity of the termination, by MBUSA, of the Mercedes Benz franchise held by Coast. Coast was an MBUSA dealer located in Toms River, New Jersey; Shansab is the owner operator of the dealership. In addition to Mercedes-Benz automobiles, Coast acted as a dual franchise with Porshe, Audi and Volkswagen.[1] (*See* Certification of Raymond Dupell (hereinafter "Dupell Cert."), Ex. E) A franchise between Coast and MBUSA was created by Dealer Agreement on January 1, 1992. As part of the Dealer Agreement, MBUSA

1. Dualing is a common practice among automobile franchisees involving the sale of two or more different vehicle lines from the same location. *See General Motors Corp. v. New A.C. Chevrolet, Inc.*, 91 F. Supp. 2d 733, 736 n.1 (D.N.J. 2000).

reserved the right to unilaterally terminate the agreement and the license of the trademarks thereunder, if Coast failed to meet certain contractual obligations. MBUSA contends that its termination of the franchise agreement was justified because Coast: (1) made fraudulent misrepresentations in its application to enter into an agreement, specifically, the concealment of the existence of foreign investors, (2) failed to maintain floor plan financing with an acceptable financial institution, (3) failed to comply with working capital and other financial requirements of the agreement, and (4) failed to comply with facility requirements. MBUSA sent notice of termination to Coast on June 10, 1999, and fearful that Coast would not voluntarily comply with the termination, MBUSA filed this complaint, later amended to add Count Three, seeking an injunction for Coast's alleged dilution of MBUSA's federal trademark by not using the proper designated indicia of the mark, such as signs, literature and other visible indicia of the mark pursuant to 15 U.S.C. § 1125(c) (Count One), seeking an injunction for Coast's alleged false designation of origin and false or misleading description of goods and services following the termination of the franchise agreement pursuant to 15 U.S.C. § 1125(a) (Count Two), and seeking rescission of the Dealer Agreement and damages based on Coast's fraud in the inducement of the franchise agreement (Count Three).

In response to MBUSA's Amended Complaint, Coast defendants filed counterclaims alleging a violation of the New Jersey Franchise Practices Act ("NJFPA") (Count One), breach of contract (Count Two), breach of

the implied covenant of good faith and fair dealing (Count Three) and violation of the Automobile Dealer's Day in Court Act ("FDDCA") (Count Four). Coast defendants later amended their counterclaim and added third-party defendants David Michael, Contemporary, and Ray Cantena Motor Cars Corp. ("Ray Cantena"). The amended counterclaim added a single new count against MBUSA for violation of the Sherman and Clayton Acts (Count Five) and added claims against MBUSA and third-party defendants for common law restraint of trade (Count Six), tortuous interference with prospective economic advantage (Count Seven), tortuous interference with contract (Count Eight), unfair competition (Count Nine), and violation of the New Jersey Antitrust Act (Count Ten).

Initially, MBUSA's Amended Complaint was assigned to the Hon. Mary L. Cooper in the Trenton vicinage, who entered an order on September 13, 1999, preliminarily enjoining Coast from any further use of the Mercedes-Benz trademark. In entering the preliminary injunction, Judge Cooper declined to enter such relief as to Count One, the dilution claim, because there was no irreparable harm to plaintiff given that the franchise was due to be terminated and the problem of dilution would be mooted by this action. On Count Two, the likelihood of confusion argument, Judge Cooper noted that granting the injunction depended on the validity of the termination of the franchise. Judge Cooper discussed the fact that notice of termination by MBUSA was provided to Coast, and thus upon termination, a preliminary injunction preventing Coast's

use of MBUSA trademarks was appropriate. Judge Cooper's preliminary injunction was upheld by the Third Circuit in an unpublished opinion issued on June 5, 2001. Following Judge Cooper's issuance of the preliminary injunction, the case was transferred to the Hon. Alfred M. Wolin in the Newark vicinage on December 28, 2000. On March 20, 2001, the Court ordered that this matter and the class action lawsuit, *In re Mercedes-Benz Antitrust Litig.*, 99-cv-4311, be consolidated for discovery purposes. The consolidation of these cases was based primarily on defendants' counterclaim involving allegations of Sherman and Clayton Act violations on the part of MBUSA, claims which are central to the pending class action. Indeed, Shansab provided significant testimony relating to the alleged antitrust violations. See *In re Mercedes-Benz Antitrust Litig.*, 2006 U.S. Dist. LEXIS 51202, 2006 WL 2129100, at *12 (D.N.J. July 26, 2006).

On August 1, 2005, the parties filed respective motions for summary judgment. Specifically, MBUSA filed a motion for summary judgment on Count Two of its Amended Complaint and for summary judgment on all of the Coast defendants' counterclaims. Related to this motion, MBUSA sought to strike the testimony and opinions of Howard M. Markovitz ("Markovitz") and John A. Del Roccili ("Del Roccili"). The testimony of Markovitz and Del Roccili is necessary to aid in calculating damages resulting from conduct involving discriminatory automobile allocation alleged in the Coast defendants' counterclaims. Coast defendants have also made several motions seeking summary judgment on

(1) Counts One and Two of their counterclaim alleging breach of contract and violation of the NJFPA, and (2) MBUSA's Amended Complaint in its entirety. Related to their summary judgment motions, the Coast defendants also seek to strike the testimony and report of Albert Parziale. Mr. Parziale's testimony addresses issues regarding the financial operation and records of Coast that ultimately relate to the termination of the Coast franchise. Finally, both David Michael and Contemporary have filed motions seeking summary judgment on the counterclaims alleged only against them. The Court will address each parties' motions in turn.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where the moving party establishes that "there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute between the parties will not defeat a motion for summary judgment unless it is both genuine and material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A factual dispute is genuine if a reasonable jury could return a verdict for the non-movant and it is material if, under the substantive law, it would affect the outcome of the suit. *Id.* at 248. The moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the non-moving party to carry its burden of proof. *Celotex v. Catrett*, 477 U.S. 317, 318, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Once the moving party has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts in question." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). To survive a motion for summary judgment, a non-movant must present more than a mere scintilla of evidence in his favor. *Woloszyn v. County of Lawrence*, 396 F.3d 314, 319 (3d Cir. 2005). The opposing party must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings. *Shields v. Zuccarini*, 254 F.3d 476, 481 (3d Cir. 2001). At the summary judgment stage the Court's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. In doing so, the Court must construe the facts and inferences in the light most favorable to the non-moving party. *Curley v. Klem*, 298 F.3d 271, 277 (3d Cir. 2002).

DISCUSSION

I. MBUSA's Motions

MBUSA seeks summary judgment on Count Two of its Amended Complaint, and on all of the Coast defendants' counterclaim. In addition, MBUSA moves to strike the testimony and reports of two of the Coast defendants' experts.

Appendix C

A. Motion for Summary Judgment on Count Two of Amended Complaint

MBUSA moves for summary judgment on Count Two of its Amended Complaint which seeks a permanent injunction for Coast's alleged false designation of origin and false or misleading description of goods and services following the termination of the Mercedes-Benz franchise agreement pursuant to 15 U.S.C. § 1125(a). As noted, Judge Cooper who was originally assigned this case, entered a preliminary injunction against Coast's use of MBUSA's trademark following the termination of the franchise agreement. Judge Cooper noted that the granting of a preliminary injunction was dependant upon a proper termination of the franchise agreement. *HN8*To secure the extraordinary relief of a preliminary injunction, MBUSA had to demonstrate that "(1) [it was] likely to succeed on the merits; (2) denial [would] result in irreparable harm; (3) granting the injunction [would] not result in irreparable harm to the defendant[s]; and (4) granting the injunction [was] in the public interest." *Maldonado v. Houstoun*, 157 F.3d 179, 184 (3d Cir. 1998), cert. denied, 526 U.S. 1130, 119 S. Ct. 1802, 143 L. Ed. 2d 1007 (1999) (as to a preliminary injunction). A plaintiff must establish that all four factors favor preliminary relief. *Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187 (3d Cir. 1990). The standards for a permanent injunction are essentially the same as for a preliminary injunction, except that the plaintiff must show actual success on the merits, not a likelihood of success, to obtain a permanent injunction. *See University of Texas v. Camenisch*, 451 U.S. 390,

392, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981). Thus, plaintiff will succeed and the Court will grant a permanent injunction on Count Two of the Amended Complaint if plaintiff can demonstrate that termination of the franchise agreement was proper.

To support its claim that termination of the franchise was proper, plaintiff alleges several failures to perform specific obligations under the franchise agreement. Plaintiff places heaviest reliance on alleged misrepresentations made by Shansab regarding the source of funds available to capitalize the dealership. The Application for Dealership Agreement and the Franchise Agreement, both signed by Shansab, provide that any such misrepresentations made with regard to the application for a dealership are proper grounds for termination of the Franchise Agreement. Plaintiff alleges that before termination of Coast's Franchise Agreement, it discovered that a portion of the funds that Coast claimed as capitalization for the dealership was actually encumbered loans from private investors,[2] in direct

2. Plaintiff claims it originally learned of the true nature of the source of the funds through Shansab's trial testimony in an unrelated case before Judge Cooper in which Shansab unsuccessfully alleged that Toyota had discriminated against him based on his race and national origin in not allowing him to acquire two Toyota dealerships. In that case, Shansab testified that:

> Q: Okay. And to Mercedes Benz you represented that you had in cash in the bank $2.39 million, is that right?

(Cont'd)

violation of the Franchise Agreement.[3] More importantly, plaintiff asserts that issue preclusion, or what is more formally known as collateral estoppel, precludes the Coast defendants from litigating the propriety of the franchise termination. Specifically, plaintiff points to a decision by Judge Garrett Brown (now Chief Judge) in *Coast Automotive Group, Ltd. v. VW Credit*, Civ. No 97-2601 (D.N.J. Oct. 30, 2002) (slip opinion). In *Coast*, Volkswagen brought suit against Coast seeking rescission of the Volkswagen Dealer Agreement on grounds identical to this case, namely that Coast had misrepresented the source and nature of its funding. The rescission claim was tried as a bench trial before Judge Brown. While Judge Brown entered judgment in favor of Coast and denied Volkswagen's claim for rescission based on Volkswagen's failure to prove scienter, the Court made detailed factual findings

(Cont'd)

A: That's correct.

Q: That was money, money that had come from Japanese investors, right?

A: That's correct.

Q: Did you ever disclose the source of those funds to Mercedes-Benz?

A: No, I did not.

3. Section 15T(h) of the Franchise agreement allows for termination based on "[a]ny misrepresentation by Dealer or by any Dealer Operator or Owner in applying for this dealer Agreement, or regarding the source of funds or capitalization of Dealer."

including that "the Court finds by clear and convincing evidence that the $ 2.5 million provided to Shansab by his Japanese friends was encumbered" and further that,

> As stated, this Court finds that Tamim Shansab and Nasir Shansab misrepresented to [Volkswagen] that the $ 2.5 million they received from their Japanese friends and intended to invest in Coast through TSE was completely unencumbered. There is little doubt that this fact was material to the approval of the franchise applications. Likewise, the very fact and nature of the application indicates that the Shansabs obviously intended that the defendants rely on the information provided and that the defendants did in fact rely on it.

(Certification of Michael S. Waters ("Waters Cert."), Ex. B2.) This decision was not appealed.

In addition, Coast brought claims under the New Jersey Franchise Practices Act and the Automobile Dealer's Day in Court Act which were tried before a jury which found in favor of Volkswagen based on Coast's violation of the Franchise Agreement. That jury verdict was upheld by the Third Circuit in an unpublished opinion. See *Coast Automotive Group, Ltd. v. VW Credit, Inc.*, 119 F. App'x. 419, 424-25 (3d Cir. 2005) (hereinafter "*VW Credit*"). In upholding the jury's verdict, the Third Circuit found

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[W]e find the evidence is sufficient to support the verdict based on Coast's substantial noncompliance in materially misrepresenting its financial ability in the dealer application. . . . Here, Tamim Shansab and Nasir Shansab represented on the dealer application that their personal investments of $ 1.6 million and $ 400,000 respectively were unencumbered. Nowhere did they disclose that the money actually came from investors in Japan. In a separate agreement with these investors, Tamim Shansab agreed to repay $ 1.7 million and to grant the investors a beneficial ownership interest in the dealership. VOA/AOA relied on Shansab's representations of his financial ability and those representations were central to VOA/AOA's decision to grant the dealership to Coast. Shansab's failure to disclose that the money he promised was not his and that investors wholly unknown to VOA/AOA had an ownership interest in the dealership constituted a material breach of the express terms of the dealership application. Thus, the evidence was sufficient for the jury to find under § 56:10-9, that Coast failed to substantially comply with the franchise dealership application.

Id.

Based on these judicial determinations, MBUSA argues that Coast is collaterally estopped in this case from claiming that MBUSA's termination was improper. The doctrine of collateral estoppel, as applied by New Jersey courts, requires demonstration of these elements: (1) the issue presented in the earlier action was identical to the one raised in a later action; (2) there was a final judgment on the merits; (3) the party asserting the issue earlier is the same or is in privity with the party currently raising the issue; (4) the party was given a full and fair opportunity to litigate the issue; and (5) the determination of the issue was essential to the final judgment. *See In re the Estate of Dawson*, 136 N.J. 1, 20, 641 A.2d 1026 (1994). Here, the Coast defendants claim that neither factual findings by either the Third Circuit or by the District Court were "essential" to the final judgments. Coast defendants argue that because the District Court found against Volkswagen its factual findings were therefore not essential to the ultimate decision and alternatively Coast defendants assert that because the Third Circuit noted an alternative basis to support the jury verdict on appeal, that its factual findings regarding the funding were technically not essential to the Circuit's affirmance of the jury verdict.

The Court finds that the District Court's factual findings that were made in reference to Volkswagen's rescission motion were not essential to the court's ruling. The District Court ultimately determined that the plaintiff had failed to prove the requisite scienter requirement in order to grant the relief of rescission

sought by the dealer. Ultimately, the issue of scienter was dispositive and related in no way to its factual holdings regarding the encumbered funding. As such, these findings could not be deemed essential for purposes of collateral estoppel.

However, the Third Circuit's findings regarding the issue of improper funding are essential and are properly subject to application of collateral estoppel to bar Coast defendants from litigating the issue of whether the funding was proper. This Court has previously noted that alternative holdings are considered necessary to the final judgment and thus retain preclusive effect. *See McLendon v. The Continental Group, Inc.*, 660 F. Supp. 1553, 1561 (D.N.J. 1987) (noting that "even if the holdings are considered as alternative grounds, the Restatement, generally adopted by the Third Circuit, states that alternative holdings on appeal are 'necessary' to judgment and therefore preclusive" (citations omitted)); *see also* Restatement (Second) of Judgments § 27, comment o (1982); *In re Dalkon Shield Punitive Damages Litig.*, 613 F. Supp. 1112, 1117 (E.D. Va. 1985); 18 Charles A. Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice and Procedure § 4421 (2002). As such, this Court finds that plaintiff's termination of the franchise was proper, given preclusive effect of the Third Circuit's determination that the misrepresentations made by Shansab regarding the source of funds available to capitalize the dealership were in direct conflict with the performance obligations of the franchise agreement.

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Because plaintiff's claim for a permanent injunction is dependant on a determination that the termination was proper, the Court finds that since plaintiff's termination of the Coast franchise was proper, plaintiff's have demonstrated actual success on the merits to support the grant of a permanent injunction against Coast defendants regarding the use of the Mercedes-Benz trademark by defendants. The grant of injunctive relief is appropriate here and now to prevent the future use of the trademark by defendants who, although they have long since discontinued their use of the trademark, continue to resist plaintiff's claim and indeed seek reinstatement of their franchise by counterclaims. *See Apollo Distrib. Co. v. Jerry Kurtz Carpet Co., Inc.*, 696 F. Supp. 140, 143 (D.N.J. 1988). Coast is hereby permanently enjoined from any use of the tradename, trademark, and servicemark "Mercedes-Benz," and the Mercedes-Benz logo and Three-Pointed Star, both two and three dimensional, registered in the United States Patent and Trademark Office under U.S. trademark and service mark registration numbers 1,045,081; 1,045,080; 1,060,986; 657,387; 661,311; and 657,386 on any property, real or personal, in any business dealings with any person or entity and in any advertisements.

B. Motion for Summary Judgment on Counts One through Four of Coast Defendants' Counterclaim

Plaintiff asserts that a determination by this Court that the franchise agreement between plaintiff and Coast was properly terminated will effectively dismiss the

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Coast defendants' counterclaims for violation of the NJFPA (Count One), breach of contract (Count Two), breach of the duty of good faith and fair dealing (Count Three) and violation of the Automobile Dealer's Day in Court Act ("ADDCA") (Count Four). Plaintiff contends that it is entitled to summary judgment pursuant to N.J.S.A. 56:10-9 which provides that:

> It shall be a defense for a franchisor, to any action brought under this act by a franchisee, if it be shown that said franchisee has failed to substantially comply with the requirements imposed by the franchise and other agreements ancillary or collateral thereto.

N.J.S.A. 56:10 9 (West 2001). Curiously, plaintiff seems to suggest, without providing any support for the position, that this provision in the NJFPA is somehow applicable to its common law claims and its federal ADDCA claim. This is not the case, as the defense applicable in the New Jersey statute is applicable only to actions "brought under this act." *Id.* As such, the Court will apply its determination that termination of the franchise agreement was proper to each counterclaim separately.

To begin, the Court finds that there is no genuine issue of material fact regarding Coast defendants breach of contract counterclaim. As noted, the franchise agreement explicitly established plaintiff's right to unilaterally terminate the agreement and the license of the trademarks thereunder, if Coast failed to meet

certain contractual obligations. This Court has determined that collateral estoppel should be applied by the Third Circuit's earlier determination that the Coast defendants had made misstatements regarding the nature of the funding for the franchise. Because the contract provided for the right to unilaterally terminate the agreement in the event that the franchisee made any misstatements as to the funding of the franchise, there can be no dispute that plaintiff's actions constitute a breach of the agreement.[4] As such, Count Two of Coast defendants' counterclaim is dismissed.

At first glance, Coast defendants' counterclaim for breach of the NJFPA appears to be completely precluded by the explicit language of N.J.S.A. 56:10-9. Indeed, at least several courts have recognized that § 56:10-9 "allows a franchisee's substantial

4. In their own motion seeking summary judgment on Counts One and Two of the counterclaim, Coast defendants argue that summary judgment in favor of plaintiff on the breach of contract claim is not warranted but should be granted in their favor because plaintiff failed to pay Coast defendants a certain sum owed for the return of parts as outlined by the franchise agreement. Specifically, pursuant to the franchise agreement and the NJFPA, a franchisor must compensate a franchisee for certain expenses following termination of the agreement. However, as plaintiff notes, this argument is misplaced because Coast defendants' argument is unrelated to the underlying claim asserted in their counterclaim. In their counterclaim, Coast defendants seek damages that resulted from the improper *termination* of the franchise agreement, not for contractual amounts due under the agreement or that may be required by statute.

noncompliance to serve as a complete defense to any action brought under the NJFPA." *VW Credit*, 119 F.App'x. at 423-24; *see also General Motors Corp. v. New A.C. Chevrolet, Inc.*, 263 F.3d 296, 321 n.11 (3d Cir. 2001); *In re The Matterhorn Group, Inc.*, 2002 WL 31528396 (Bankr. S.D.N.Y. Nov. 15, 2002); *Zaro Licensing, Inc. v. Cinmar, Inc.*, 779 F. Supp. 276, 286 (S.D.N.Y. 1991) ("It is a defense to a claim brought under the act [NJFPA] by a franchisee that the franchisee has failed to comply substantially with the requirements imposed by the franchisor"). However, the Third Circuit has questioned whether a parties' good faith is relevant to a claim under the Act. *General Motors Corp.*, 263 F.3d at 321 n.11. In a wide ranging footnote, the Third Circuit in *General Motors Corp.* expressed some doubt as to whether the statutory definition of good cause for terminating the franchise agreement necessarily precluded claims that the franchisor acted in bad faith. Compare id (noting that the Franchise Act specifically defines good cause which focuses on the objective actions of the franchisee and not on subjective motivations and that § 56:10-9 "allows a franchisee's substantial noncompliance to serve as a complete defense in 'any action' instituted under the [Act]"), *with id.* (noting that New Jersey courts in construing other provisions of the franchise statute, have imposed good faith requirements in particular circumstances.).

In an unpublished opinion involving Coast, the Third Circuit again addressed whether the absolute defense of § 56:10-9 is contrary to the common law duty of good faith and fair dealing as codified in § 56:10-7(e)

of the NJFPA and whether such a duty should be applicable to the entire statute. *See VW Credit*, 119 F. App'x. at 424. The Court determined that:

> Even if we assume that § 56:10-7(e) codifies the common law duty of good faith and fair dealing and that § 56:10-9 effects a change by providing a defense to franchisors not available at common law, we are not persuaded that § 56:10-9 is inconsistent with or inapplicable to actions brought under § 56:10-7(e). HN81n New Jersey, statutes that impose duties or burdens, or establish rights, or provide benefits not recognized by common law, are subject to strict construction. *It is clear that if the statutory defense makes any change in the common law at all, it does so only with regard to those cases where the franchisee also breached the franchise agreement.*

Id. (emphasis added) (internal citations omitted). Given the clear language of the statute and in accordance with the Third Circuit's dicta, the Court finds that the NJFPA should be read to preclude any claim under the Act alleging bad faith when it has been demonstrated that the franchisee substantially failed to comply with the agreement. Because the Court has held that Coast defendants failed to substantially comply with the franchise agreement, summary judgment for plaintiff on Count One is now appropriate.

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Counts Three and Four of Coast defendants' counterclaim involve allegations of bad faith. Specifically, the Coast defendants allege that plaintiff breached the covenant of good faith and fair dealing and the ADDCA which requires automobile manufacturers "to act in good faith in performing or complying with any of the terms or provisions of the [automobile] franchise, or in terminating . . . the franchise with said dealer . . . ." 15 U.S.C. § 1222. The Court notes that Coast defendants' claims which are premised on allegations of bad faith are necessarily separate and independent from the alleged breach of the franchise agreement claim. That is to say, Coast defendants' failure to allege a breach of contract claim is not dispositive of its claims involving allegations of bad faith. *See Bak-A-Lum Corp. v. Alcoa Bldg. Prod.*, 69 N.J. 123, 129-30, 351 A.2d 349 (1976) (Noting that a breach of the implied covenant of good faith and fair dealing differs from a "literal violation of a contract"); *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 244, 773 A.2d 1121 (2001) (citing *Sons of Thunder, Inc. v. Borden*, 148 N.J. 396, 419, 690 A.2d 575 (1997)) ("Although the implied covenant of good faith and fair dealing cannot override an express term in a contract, a party's performance under a contract may breach that implied covenant even though that performance does not violate a pertinent express term."); *Northview Motors, Inc. v. Chrysler Motors Corp.*, 227 F.3d 78, 93 (3d Cir. 2000),("if an ADDCA defendant has objectively valid reasons for terminating its relations with a dealer, the dealer cannot prevail in an ADDCA action absent evidence that the defendant had an ulterior motive for its action").

Here, a genuine issue of material fact exists regarding whether plaintiffs retained an ulterior motive for terminating Coast's franchise agreement, namely that plaintiff sought to punish Coast defendants for refusing to participate in an alleged price fixing conspiracy. Plaintiff vigorously denies the Coast defendants' allegations regarding the existence of such a conspiracy. But, this Court has already determined in the related class action that genuine issues remain regarding the existence of any conspiracy. Here, there remains a genuine issue regarding whether Coast defendant's alleged resistance to such an alleged conspiracy formed the basis for retaliatory conduct on the part of plaintiff by terminating the franchise agreement. Regardless of whether an independent, objective basis exists for such a termination, what remains at issue is the subjective motivations of the plaintiff. For these reasons, plaintiffs motion for summary judgment on Counts Three and Four of Coast defendants' counterclaims is denied.

C. Plaintiff's Motions for Summary Judgment on Counts Five through Ten of Coast Defendants' Counterclaim and to Exclude the Expert Testimony of Markovitz and Del Roccili

Plaintiff moves for summary judgment on all of Coast defendants' counterclaims based on their failure to allege damages. Proof of damages is a necessary element of Coast defendants' claims and summary judgment is proper if Coast defendants cannot prove damages at trial. *See Rocci v. Ecole Secondaire*

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Macdonald-Cartier, 323 N.J. Super. 18, 731 A.2d 1205 (App. Div. 1999). Plaintiff's motion is premised entirely on its claim that Coast defendants' expert testimony regarding damages is unreliable pursuant to Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Plaintiff argues that Coast defendants' counterclaims allege that plaintiff punished Coast for not joining the alleged price fixing conspiracy by failing to provide Coast with the cars that Coast claims it would have received under plaintiff's allocation system. Markovitz and Del Roccili offered expert opinions regarding plaintiff's alleged failure to allocate cars and the resulting damages from such allocation failures. Because a determination that the opinions of Markovitz and Del Roccili are invalid under Daubert would leave Coast defendants with no evidence of damages resulting from the alleged improper allocation, the parties have extensively briefed this issue. For the following reasons, the Court finds that the opinions of Markovitz and Del Roccili are not reliable, should be stricken and the Court grants summary judgment on Counts Five through Ten of Coast defendants amended counterclaim.[5]

5. Plaintiff suggests that if the Court determines that Coast defendants are unable to prove damages based on the striking of the expert testimony of Markovitz and Del Roccili, that the Court should grant summary judgment on all of Coast defendants counterclaims including Counts One through Four. Counts Five through Ten of the amended counterclaim added a single new count against MBUSA for violation of the Sherman and Clayton Acts (Count Five) and added claims against

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Rule 702 of the Federal Rules of Evidence governs the standards applicable for admission of expert testimony:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied

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(Cont'd)

MBUSA and third-party defendants for common law restraint of trade (Count Six), tortuous interference with prospective economic advantage (Count Seven), tortuous interference with contract (Count Eight), unfair competition (Count Nine), and violation of the New Jersey Antitrust Act (Count Ten). These claims were premised on Coast defendants' allegations regarding a conspiracy to deny a reasonable allocation of automobile to the Coast dealership. Alternatively, Coast defendants counterclaims One through Four, discussed above, although incorporating the allegations regarding alleged improper allocation, are premised primarily on plaintiff's alleged wrongful termination of the parties' franchise agreement. As such, failure to prove damages resulting from the alleged conspiracy to deny a reasonable allocation does not impact those claims that depend on allegations that plaintiff acted in bad faith in terminating the franchise.

> the principles and methods reliably to the facts of the case.

Fed.R.Evid. 702.

The Third Circuit has addressed the contours of Rule 702 explaining that the rule "embodies a trilogy of restrictions on expert testimony: qualification, reliability and fit." *Schneider ex rel. Estate of Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003); *see also In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717, 741-43 (3d Cir. 1994) ("*Paoli II*")(citing *Daubert*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469). The qualification element has been interpreted to require that the witness possess specialized expertise, but has been applied broadly by the Third Circuit such that "a broad range of knowledge, skills, and training qualify an expert." *Id.* The plaintiff does not challenge the qualifications of either Markovitz or Del Roccili.

More relevant here is the requirement that expert testimony be reliable. In interpreting this requirement, the Third Circuit has required testimony to "be based on the 'methods and procedures of science' rather than on 'subjective belief or unsupported speculation'; the expert must have 'good grounds' for his on her belief. In sum, *Daubert* holds that an inquiry into the reliability of scientific evidence under Rule 702 requires a determination as to its scientific validity." *Paoli II*, 35 F.3d at 742 (quoting *Daubert*, 509 U.S. at 590). The Third Circuit has identified a list of non-exhaustive factors that a district court may consider in determining a proposed expert's reliability.

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As a final component of assessing proposed expert testimony, Rule 702 requires that the testimony must fit the issues in the case. "In other words, the expert's testimony must be relevant for the purposes of the case and must assist the trier of fact." *Schneider*, 320 F3d at 404. The Supreme Court in *Daubert* noted that "Rule 702' s 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility." 509 U.S. at 591-92.

Pursuant to the limitations in Rule 702, the district court is mandated the role of gatekeeper, assuring that opinion testimony that does not meet the requirements of qualification, reliability and fit from reaching the jury. *See Daubert*, 509 U.S. at 592 ("Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a) [of the Federal Rules of Evidence] whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.").

Plaintiff's primary challenge to Markovitz and Del Roccili's testimony is the reliability and fit of that testimony. Essentially, plaintiff claims that there is no foundation for the assumptions made by Coast defendants' experts in their reports and that their methodology to calculate future allocations and subsequent damages was flawed and arbitrary. That claim has merit.

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At the outset, the Court finds unpersuasive Coast defendants' argument that plaintiff's failure to produce its own expert opinions requires the Court to permit the testimony of Markovitz and Del Roccili because it remains unrebutted. This argument misses the mark precisely because the burden to prove damages and to prove the reliability of expert opinions with regard to those damages remains with *Coast*, not MBUSA. *See Soldo v. Sandoz Pharmaceuticals Corp.*, 244 F. Supp. 2d 434, 558 (W.D. Pa. 2003) (noting under similar circumstances that allowing expert testimony based on an opposing parties failure to present an expert of its own "would turn Rule 702 and Daubert on their heads by allowing the absence of reliable testing and data to support a causation opinion. Such an approach would also flip the relevant burdens-it is plaintiff who has the burden of proving causation and the reliability of her experts' testimony.").

1. *Challenge to Markovitz's Opinion*

Plaintiff argues that Markovitz's expert opinion is unreliable because he made no computations of automobile allocations based on Coast's actual sales and in fact did not look at any of the circumstances surrounding Coast's operation to make an assessment of what constituted a reasonable allocation.[6] Instead, Markovitz looked only at the average growth in the retail

6. The Court notes that Markovitz's expert report contains no analysis and consists entirely of profit schedules based on factual assumptions that the report does not explain or analyze in any significant way.

sales of New York area dealers and relied entirely on Shansab's statement that Coast received a fair allocation in 1994 but not in 1995 until termination of the franchise in 1999. In particular, Markovitz admitted that he did not consider any other factors, including the specific number of cars allocated to Coast other than assuming that Coast allocations should have increased at a rate equal to the average of all Mercedes-Benz dealers in the tristate area. In addition, Markovitz failed to address the fact that Coast was allocated more automobiles than the dealership actually purchased.

The following deposition testimony of Markovitz summarizes the basis for his opinion:

> Q: Did [Shansab] tell you that 1994 was the last year that he got his proper allocation?
>
> A: I don't—I would say yes.
>
> Q: [D]id Mr. Shansab tell you that in 1995 and thereafter he was punished by Mercedes-Benz by being given reduced allocations?
>
> A: That was my understanding.
>
> Q: From what he told you?
>
> A: Yes.
>
> Q: And that these were allocations that were less than he was entitled to as an allocation under their allocation system?

A: I don't know if he referred to it in that manner.

Q: But he claimed to be entitled to more cars?

A: That's correct.

Q: . . . Do you have any other letters —

A: No.

Q: – that show what the allocation —

A: No.

Q: —given to him was?

A: No, I do not.

Q: Now, did you ask for the allocation records—

A: No.

Q: —of Coast?

A: No.

Q: Did you ask for the allocation records of other dealers in the Northeast region?

A: No.

. . .

Q: And Mr. Shansab told you that what he actually got, that his allocation for 1995 was not a fair allocation, that he was punished during that year?

A: That's correct.

Q: Okay. And you accepted that statement from him, that he was punished during that year?

A: Yes, I did.

Q: And you based your report on that?

A: No. I based my report on the amount—his percentage of the sales in the New York region in 1994, when he claimed was the last year he received a fair allocation of cars, and in increasing his unit sales every year after that, based on the percentage of increase in sales in the New York region, I came up with the number that he would have received, and then—do, you want me to stop?

Q: No. Go ahead.

A: —and then I compared it to the number of units he would have received to the total units in the region and his share percentage was close to what it was for 1994 to verify that I had done the projection properly.

. . . .

Q: Okay but the premise of your report is that what he actually was offered and what he actually received in '95 was not his fair allocation but was a punishment allocation. You started with that assumption?

A: Yes.

Q: Okay. And that you got from Mr. Shansab?

A: That's correct.

Q: Okay. And the same is true for each year thereafter, Mr. Shansab told you that whatever his allocation was was not his fair allocation but was a punishment allocation?

A: He told me that the allocation continued on the same method going forward —

Q: Right.

A: —that he wasn't treated fairly.

(Certification of Michael S. Waters, Ex. 2, p. 97-103.)

Based on Markovitz's own admissions, he relied on factual assertions and assumptions provided by Shansab without doing any independent analysis and without providing a factual basis for his conclusion that Coast was damaged by unfair allocation. Such speculation should bar the expert's testimony because an "expert's

opinion must be based on the methods and procedures of science rather than on subjective belief or unsupported speculation." *Paoli II*, 35 F.3d at 742 (citations and internal quotations omitted); *Oddi v. Ford Motor Co.*, 234 F.3d 136, 156 (3d Cir. 2000) ("Although Daubert does not require a paradigm of scientific inquiry as a condition precedent to admitting expert testimony, it does require more than [a] haphazard, intuitive inquiry."). The Third Circuit has cautioned against the admission of an opinion without sufficient factual predicate, referring to such an opinion as a "castle made of sand." *Elcock v. KMart Corp.*, 233 F.3d 734, 755 (3d Cir. 2000); *see also Gumbs v. Int'l Harvester, Inc.*, 718 F.2d 88, 99 (3d Cir. 1983) (ruling that the trial judge was in error by "permitting plaintiff's expert to testify as to plaintiff's future earnings loss without first requiring plaintiff to establish a factual basis for this testimony"); *Benjamin v. Peter's Farm Condo. Owner's Ass'n.*, 820 F.2d 640, 643 (3d Cir. 1987) (finding a district court was in error in admitting expert testimony regarding post-injury earning capacity that was based on the "personal belief of the plaintiff). Moreover, a proposed expert opinion based on factual assumptions not present in the case "cannot be said to 'assist the trier of fact,' as Rule 702 requires" because "[t]his type of opinion misleads the factfinder and arguably does not comply with the 'fit' requirement." *Elcock*, 233 F.3d at 756.

Plaintiff points to additional specific evidence to support the conclusion that Markovitz's opinion is unreliable. As example, plaintiff notes that had

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Markovitz looked at Coast's actual allocation records, he would have discovered that in 1995, the first year in which Shansab alleges Coast was provided an unfair allocation, Coast was actually offered 187 cars by plaintiff but that Coast only purchased 171 cars leaving 16 units still available to Coast. (Certification of Raymond Dupell, Ex. A) Because Markovitz based the unfair allocation calculations out from the 1995 numbers, his failure to consider that more cars were allocated to Coast than were actually purchased necessarily impacted the allocation calculations in later years, and by definition were necessarily unreliable.

Markovitz also offers that his damage assessment was a result not just of unfair allocation in the total number of cars but also resulted from the losses attributable to allegedly undesirable cars. Specifically, Coast defendants claim that plaintiff provided a disproportionate mix of cars to Coast that were either difficult models to sell, or plaintiff allegedly provided a number of '94 cars at the end of the year just as the '95 model was being offered making it difficult to sell at a profit. Overall, Markovitz provided no factual basis for his assessment of a $ 1,000 compensation amount for these types of cars. Additionally, evidence suggests that Coast received equivalent and sometimes fewer numbers of difficult to sell cars than the average Mercedes-Benz dealer in the region. (*See* Certification of Raymond Dupell, Exs. B & C.)

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2. *Challenge to Del Rocci's Opinion*[7]

Coast defendants offer the expert testimony of Del Rocci in order to value the franchise rights of the coast dealership on the date the franchise was terminated and to determine a future stream of income based on that value. (See Certification of Michael S. Waters, Ex. 5, p. 2.) In determining the valuation of the franchise at the date of termination, Del Rocci based his conclusion on the profits projected by Markovitz in his report.[8]

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7. The Court received notice from Coast defendants in June of 2006 of the unfortunate death of Dr. Del Roccili. Coast defendants seek to substitute the testimony of Dr. Del Roccili with another expert based on the same report. The Court need not consider this request given its discussion below regarding the inadmissibility of Dr. Del Roccili's report.

8. In his deposition testimony, Markovitz explained the connection between his report and the valuation report including future projected income stream that was conducted by Del Roccili:

> A: If I remember correctly, it was decided that the furthest we could go in projecting the lost profits was to the date of the termination of the franchise.
>
> Q: That's what you were going to do?
>
> A: Yeah. And Sam Kursch was going to prepare the valuation of the franchise as of that date.
>
> Q: *And it was going to be based on the profits you projected during the operation of the franchise?*
>
> A: Yes.

(Cont'd)

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Because the Court has excluded the report of Markovitz based on its failure to conform with the requirements of Fed. R. Evid. 702 of reliability and fit, and because Del Rocilli's report is entirely dependent upon the methods and calculations performed in Markovitz's report, Del Rocilli's report must likewise be stricken.

Here, Markovitz and Del Rocilli's opinions are based on nothing more than speculation and subjective belief in the truth of the assertions made by Shansab about unfair allocation without any factual basis for those conclusions. They are thus unreliable and inadmissible under Fed. R. Evid. 702. Because of the inadmissability of these opinions. Coast defendants cannot establish damages associated with plaintiff's allegedly

(Cont'd)

Q: And subsequently Dr. del Ricolli took the place of Mr. Kursch and did that job?

A: That's correct.

Q: Did you have conversations with Dr. del Ricolli?

A: One or two.

Q: And what can you recall of those conversations?

A: They were similar to the conversation we had that day with Sam Kursch and what information he was going to need to prepare his report.

Q: And that resulted in the same arrangement?

A: Yes.

(Certification of Michael S. Waters, Ex. 2, p. 60-61.)

discriminatory allocation of automobiles. This failure to prove damages is fatal to Coast defendant's counterclaims Five through Ten. The Court therefore grants summary judgment in favor of plaintiff on those counterclaims.

II. COAST DEFENDANTS' MOTIONS

A. Coast Defendants' Motions for Summary Judgment

Coast defendants seek summary judgment on all three claims of plaintiff's Amended Complaint. In addition, Coast defendants seek summary judgment on Counts One (violation of the NJFPA) and Two (breach of contract) of their counterclaims.[9]

9. As the Court noted in footnote four, *supra*, Coast defendants argue that summary judgment in their favor is warranted on Counts One and Two because plaintiff failed to pay Coast defendants a certain sum owed for the return of parts as outlined by the franchise agreement. The Court rejected this particular claim because in their counterclaim, Coast defendants seek damages that resulted from the improper termination of the franchise agreement, not for contractual amounts due under the agreement or that may be required by statute. In addition, Coast defendants have raised the issue of alleged debt under the franchise agreement for the first time in this motion. No mention of the debt was made in their counterclaim, nor did Coast defendants refer to the debt in answering plaintiff's interrogatories regarding contract damages. Finally, no discovery regarding this debt was ever taken. In sum, the Court will not address Coast defendants' claim of debt owed under the franchise agreement in the context of the pending summary judgment motions.

To begin, summary judgment on Count Two of plaintiff's Amended Complaint and on Counts One and Two of the counterclaim in favor of Coast defendants is not appropriate given this Court's grant of summary judgment of these claims in favor of plaintiff.

Turning to Count One of the Amended Complaint, Coast defendants seek summary judgment on plaintiff's claim for an injunction based on Coast's alleged dilution of MBUSA's federal trademark by not using the proper designated indicia of the mark, such as signs, literature and other visible indicia of the mark pursuant to 15 U.S.C. § 1125(c). Essentially, Coast defendants argue that plaintiff's Amended Complaint seeks "nothing more than injunctive relief and that it has already "obtained the relief it sought." Judge Cooper, in ruling on the motion for a preliminary injunction, declined to enter such relief as to Count One, the dilution claim, because there was no irreparable harm to plaintiff given that the franchise was due to be terminated and the problem of dilution would be mooted by termination of the franchise agreement. That remains the case now. This Court has determined that termination of the franchise was proper and has granted a permanent injunction on Count Two of plaintiff's Amended Complaint. To that end, it appears that the relief sought under Count One is now moot.

Coast defendants' remaining argument in its multiple summary judgment motions is its assertion that summary judgment is appropriate on plaintiff's claim for rescission and damages based on Coast defendants'

fraud in the inducement of the franchise agreement. In order to rescind the franchise agreement, the party seeking rescission must prove by clear and convincing evidence: "(1) a material misrepresentation of a presently existing or past fact; (2) the maker's intent that the other party rely on it; and (3) detrimental reliance by the other party." *Coast Automotive Group, Ltd. v. VW Credit*, Civ. No 97-2601, at *15 (D.N.J. Oct. 30, 2002) (slip opinion); *see also Granite State Ins. Co. v. UJEX, Inc.*, 2005 U.S. Dist. LEXIS 13692, 2005 WL 1618792, at *6 (D.N.J. July 11, 2005) (quoting *First American Title Ins. v. Lawson*, 351 N.J. Super. 407, 798 A.2d 661, 667 (N.J. Super. Ct. App. Div. 2002), rev'd in part on other grounds, 177 N.J. 125, 827 A.2d 230 (N.J. 2003)). The element of detrimental reliance requires the moving party to demonstrate damages. *See Coast Automotive Group, Ltd. v. VW Credit*, Civ. No 97-2601, at *17. Coast defendants allege that the record does not reflect any damages suffered by plaintiff. As alleged in the Amended Complaint, plaintiff claims that it suffered damages based on Coast defendants' fraudulent inducement because the "Dealer Agreement is subject to rescission and Coast's use of the trademarks, therefore has been and is unlicensed and unauthorized." In other words, plaintiff alleges damages based on the unlicensed use of its trademarks. This argument makes little sense because it puts the cart before the horse. Even if the Court were to accept plaintiff's claim for damages, Coast defendants note that "[i]n a suit for money damages for fraud . . . [i]n order to obtain equitable relief such as rescission . . . clear and convincing proof [of damages] is required." *Batka v. Liberty Mutual Fire Ins. Co.*, 704

F.2d 684 (3d Cir. 1983). Plaintiff argues generally that it was damaged by Coast's refusal to accept cars that were allocated to them and that customer satisfaction suffered greatly. However, this harm is completely unrelated to the underlying misstatements made by Coast defendants in its application for the franchise dealership. Plaintiff has produced no evidence that it suffered any trademark damage resulting from the alleged misrepresentations.

Even assuming the existence of a genuine issue of material fact relating to the claim of equitable fraud, specifically the element of damages, the Court finds that rescission is not an appropriate remedy under the circumstances of this case. In general, rescission is available under New Jersey law when one of the parties to a contract commits fraud in inducing the other party to enter into the contract. *See Merchants Indemnity Corp. v. Eggleston*, 37 N.J. 114, 130-31, 179 A.2d 505 (1962). "If a party to a contract is guilty of misrepresentation, the contract is voidable and the victim may rescind the contract." *Cooper v. Borough of Wenonah*, 977 F. Supp. 305, 313 (D.N.J. 1997). The remedy of rescission results in the "unmaking" of the parties' agreement from the beginning as opposed to mere termination. *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1296 (Fed. Cir. 1999). A court's application of the rescission remedy is discretionary should be made only in extraordinary circumstances. *See id.*; *Hilton Hotels Corp. v. Piper Co.*, 214 N.J. Super. 328, 336, 519 A.2d 368 (Ch. Div. 1986). In addition, a court must apply rescission only in

circumstances where it is clear that the court can return the parties to the "ground upon which they originally stood." *Id.* (quoting *Driscoll v. Burlington-Bristol Bridge Co.*, 28 N.J. Super. 1, 4, 99 A.2d 829 (App. Div. 1953)); *see also Hamel v. Allstate Ins. Co.*, 233 N.J. Super. 502, 506-07, 559 A.2d 455 (App. Div. 1989); *Sempre Constr. Co. v. Tp. of Mt. Laurel*, 196 N.J. Super. 204, 209, 482 A.2d 36 (Ch. Div. 1984).

The passage of time in this case and the complicated relationship between the parties demonstrate to the Court that a return to the "ground upon which they originally stood" would be an exercise in futility. To say that Coast's franchise relationship with plaintiff and its other dualed car manufacturers including Porshe, Audi and Volkswagen was strained would be a mild characterization of what has ultimately been a tumultuous relationship. Throughout this long relationship, both parties have expended large amounts of capital and unmaking these transactions would be next to impossible. *See, e.g., Walter v. Holiday Inns, Inc.*, 784 F. Supp. 1159, 1166 (D.N.J. 1992) ("Prior to and after the [execution of the contract], the defendants infused some $ 24.8 million dollars of capital into the project for development. Subsequent to this, the defendants have contributed $ 215 million for maintenance and upgrading of the facility. Under these circumstances, it would be virtually impossible for the court to 'unmake' the buy-out transaction so as to restore the parties to the status quo ante."). Because the equities in this case militate against rescission of the franchise agreement and because plaintiff has

presented no clear and convincing evidence of trademark damages that resulted from the misstatements of Coast defendants, Coast defendants motion for summary judgment on Count Three is granted.

B. Coast Defendants' Motion to Exclude the Expert Testimony of Albert Parziale

The Coast defendants also moved separately to dismiss the sole expert witness proffered by plaintiff. Plaintiff offered the opinion of Mr. Parziale to address the various financial and accounting issues relating to Coast's financial records and to provide expert opinions on the circumstances surrounding plaintiff's termination of the Coast franchise and the overall operation of the dealership. Essentially, Coast defendants argue that the opinion that would be offered by Mr. Parziale is "irrelevant" because it addresses "only a narrow subject - the financial affairs of Tamim Shansab." However, a review of Mr. Parziale's report demonstrates that his opinion was not limited to the financial affairs of Mr. Shansab but deals extensively on the financial condition of Coast and Mr. Shansab who was its principal. Such testimony is certainly relevant. *See generally In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 179 (E.D. Pa. 2000). Moreover, Coast defendants' motion is irrelevant in light of this Court's grant of summary judgment on Count Two of the Amended Complaint in favor of plaintiff. In so granting, the Court recognizes the preclusive effect of the Third Circuit's determination that Coast's was in substantial

noncompliance with the franchise agreement by materially misrepresenting its financial ability in the dealer application. Because Mr. Parziale's offered opinions relate to this subject which the Court has already disposed of, Coast defendants' motion is denied as moot.

III. DAVID MICHAEL AND CONTEMPORARY'S MOTIONS

Third-party defendants David Michael and Contemporary move for summary judgment on all of Coast and Shansab's counterclaims alleged against them (Counts Five through Ten). Because the Court has already granted summary judgment on these counts in favor of plaintiff based on Coast defendants inability to demonstrate damages as a result of the exclusion of its experts' testimony, these claims are likewise dismissed as to third-party defendants. Third-party defendants are entitled to summary judgment.

Appendix C

CONCLUSION

For the forgoing reasons, the Court grants to plaintiff summary judgment on Count Two of its Amended Complaint and on Counts One, Two, and Five through Ten of Coast defendants' counterclaims. Relatedly, the Court grants plaintiff's motion to strike the expert testimony of Markovitz and Del Roccili and grants plaintiff's request for a permanent injunction. The Court denies the Coast defendants' motions with the exception of their motion for summary judgment on Count Three of plaintiff's Amended Complaint, which is granted. The Court grants third-party defendants' motion for summary judgment as to Counts Five through Ten of Coast defendants' Counterclaims.

s/ William H. Walls
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MARCH 10, 2010

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-4608

MERCEDES-BENZ USA, INC.

v.

COAST AUTOMOTIVE GROUP, LTD.;
TAMIM SHANSAB,

Appellants

v.

DAVID MICHAEL MOTOR CAR CORP.;
RAY CATENA MOTOR CARS CORP.;
CONTEMPORARY MOTOR CARS, INC.

BEFORE: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY and WEIS,* *CIRCUIT JUDGES.*

* As to Panel Rehearing Only

Appendix D

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellants having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

BY THE COURT:

/s/ Joseph F. Weis, Jr.
United States Circuit Judge

DATED: March 10, 2010